In The

Supreme Court of the United States

NORTH PACIFICA LLC,

Petitioner,

v.

CITY OF PACIFICA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District

PETITION FOR WRIT OF CERTIORARI

KEITH FROMM
Attorney at Law
914 Westwood Blvd.,
Suite 500
Los Angeles, CA 90024
Tel. (310) 556-0202
Fax (310) 476-6318

JAQUELYNN POPE*
MARK WARSHAW
WARSHAW & POPE
934 Hermosa Ave., Suite 14
Hermosa Beach, CA 90254
Tel. (310) 379-3410
Fax (310) 376-6817

**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does California's appellate court system deny the constitutionally guaranteed right of due process wherein it makes no provision for a party to disqualify a biased appellate panel *and* there is no guaranteed right to a review, by a court of superior jurisdiction, of any decision rendered by such a biased appellate panel?

2. Does it violate the equal protection clause of the Fourteenth Amendment for a California appellate court to vacate and reverse an inverse condemnation just compensation award by means of an *unpublished* opinion that, on its face,

(a) defies U.S. Supreme Court and California Supreme Court *stare decisis* binding precedent, and

(b) makes up law that applies *only* to this plaintiff, and no other person, where

(c) there is no guaranteed right of review, and

(d) it is virtually certain that an unpublished opinion in a civil case will not be accepted for review by a court of superior jurisdiction?

3. Does it violate the due process clause of the Fourteenth Amendment for a California appellate court to vacate and reverse an inverse condemnation just compensation award by means of an *unpublished* opinion that, on its face,

(a) defies U.S. Supreme Court and California Supreme Court *stare decisis* binding precedent, and

(b) makes up law that applies *only* to this plaintiff, and no other person, where

QUESTIONS PRESENTED – Continued

(c) there is no guaranteed right of review, and

(d) it is virtually certain that an unpublished opinion in a civil case will not be accepted for review by a court of superior jurisdiction?

4. Does it violate the takings clause of the Fifth Amendment for a California appellate court to vacate and reverse an inverse condemnation just compensation award by means of an *unpublished* opinion that, while, on its face, acknowledges the existence of a governmental taking of private property, nevertheless

(a) defies U.S. Supreme Court and California Supreme Court *stare decisis* binding precedent,

(b) makes up law that applies *only* to this plaintiff, and no other person, and

(c) results in an uncompensated government taking, where

(d) there is no guaranteed right of review, and

(e) it is virtually certain that an unpublished opinion in a civil case will not be accepted for review by a court of superior jurisdiction?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption.

North Pacifica, LLC, has neither parent nor subsidiary companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	4
STATEMENT OF THE CASE	4
REASONS WHY THE COURT SHOULD TAKE THIS CASE	16
I. BECAUSE OF THE "RIPENESS" REQUIREMENT OF *WILLIAMSON*, UNPUBLISHED STATE COURT APPELLATE OPINIONS CAN DEFEAT THE CONSTITUTIONAL RIGHT TO TAKINGS' COMPENSATION	16
II. IN CALIFORNIA, THE COMBINATION OF UNPUBLISHED OPINIONS AND THE LACK OF ANY PROCEDURE FOR DISQUALIFICATION OF AN APPELLATE PANEL FOSTERS VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION	23
CONCLUSION	28

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES

Bush v. Vera, 517 U.S. 952 (1996) 24

Patsy v. Bd. of Regents, 457 U.S. 496 (1982) 16

Payne v. Tennessee, 501 U.S. 808 (1991) 24

San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491 (2005) 2, 3, 16, 17, 28

Schneider v. State, 308 U.S. 147 (1939) 10

Williamson County Reg. Plan. Commn. v. Hamilton Bank, 473 U.S. 172 (1985) 2, 16, 17, 28

CALIFORNIA CASES

Clay v. City of Los Angeles, 21 Cal.App.3d 577 (1971) 12

County of San Diego v. California Water & Tel. Co., 30 Cal.2d 817 (1947) 12

Institoris v. City of Los Angeles, 210 Cal.App.3d 10 (1989) 6

Mehl v. People ex rel. Dept. Public Works, 13 Cal.3d 710 (1975) 6

People v. Birks, 19 Cal.4th 108 (1998) 19

Primm v. Primm, 46 Cal.2d 690 (1950) 18

Shamblin v. Brattain, 44 Cal.3d 474 (1988) 19

PETITION FOR WRIT OF CERTIORARI

Petitioner North Pacifica LLC ("NP"), respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the California Supreme Court.

OPINIONS BELOW

The decision of the California Supreme Court Denying Review of the unpublished California First Appellate District Court decision, denying NP's Petition for Certiorari, and denying NP's Request for Publication was filed on June 15, 2005 (App. G). The appellate court's unpublished decision reversing the trial court's inverse condemnation award was filed on March 23, 2005 (App. A). Pertinent orders of the appellate court are its January 6, 2005 Order Sealing Documents and denying NP's Request for Recusal (App. B); its February 12, 2005 Order Denying NP's Request for Recusal (App. C); and its April 18, 2005 Order Denying NP's Petition for a Rehearing and also Denying NP's Request to publish the appellate court's March 23, 2005 opinion (App. D). The Trial Court's Statement of Decision, awarding judgment for inverse condemnation was filed on November 12, 2003 (App. E). The Judgment was entered on March 3, 2004 (App. F).

JURISDICTION

This case arises under the Fifth and Fourteenth Amendments of the Constitution. The California State Supreme Court refused to review and/or vacate an unpublished and clearly unconstitutional opinion of the appellate court, which, in itself, vacated and reversed a sound and

well supported trial court judgment and award of just compensation, under the Fifth Amendment, in favor of Petitioner, for an inverse condemnation of Petitioner's property committed by a governmental entity.

The Appellate Opinion, while it conceded there was a governmental taking of Petitioner's private property, defied binding California and U.S. Supreme Court precedent in order to effect a politically popular but legally unsound, unfair and discriminatory result towards Petitioner. In so doing, the Appellate Opinion, ignored by the State Supreme Court, effected an uncompensated taking of Petitioner's property and made up law that not only defies established U.S. Supreme Court and California Supreme Court precedent but, because it is embodied in an unpublished and uncitable opinion, applies to no other person on the planet, except Petitioner. Petitioner contends such action violates Petitioner's Fifth Amendment right to just compensation and its Fourteenth Amendment rights to equal protection and due process.

In this case, California procedures have allowed a "runaway" rogue appellate panel to successfully (so far) evade the requirements of the Fifth Amendment's takings clause as well as the Fourteenth Amendment's due process and equal protection guarantees, by issuing an *unpublished* opinion that applies only to plaintiff herein, and no other person, and is intended to fly under the radar screen of an overworked and understaffed State Supreme Court.

Since, under *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), a takings plaintiff must bring its action in State Court in order to ripen it for consideration by a federal court, and under *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct.

2491, 2497 (2005), the State Court decision is *res judicata* for the purposes of any putative subsequent federal court action, the only remedy available for such evasive actions by a rogue appellate court would be review by the State Supreme Court. However, the unlikely prospect of State Supreme Court review which, statistically, under the best of circumstances, is a rarity, may be avoided, essentially altogether, by the simple expedient of issuing an *unpublished* opinion, which, because it has no precedential effect and cannot even permissibly be cited in other cases, garners little or no public interest.

In California, it is virtually impossible to obtain California Supreme Court review of an unpublished decision, regardless of how flagrantly the opinion flaunts the law or the Constitution.[1] For this reason, an appellate court may, by issuing an *unpublished* opinion, discriminate with impunity against politically unpopular plaintiffs by means of what is, essentially, a judicial bill of attainder. Since an unpublished opinion is not precedent in California, the procedure allows for selective prospectivity. The appellate court may flout and defy established *stare decisis* precedent of the U.S. Supreme Court and State Supreme Court, and even the Constitution, and selectively "make up" customized law in order to inflict it upon a single, politically unpopular individual without concern that its unfairness will infect any other person or faction, since, by California law, unpublished appellate opinions have no precedential effect and cannot even permissibly be cited in other cases involving other parties (Cal. Rules of Court, Rule 977 (App. O)).

---

[1] See, California Lawyer, July, 2005 "Revising Publication Standards," Gerald Uelman.

This potential abuse is far more insidious, however. A politically activist appellate court panel, unchecked by any real oversight, can "run interference" for local government officials that share the same political power bases and/or are elected by the same factions of voters. In order to curry the favor of such common constituencies or private interests, local officials have been known to expropriate private property without cost to or payment by voter/taxpayers' dollars, even where such takings, as here, have definitively been ruled by a trial court to be in violation of the Fifth Amendment. Thus, without any real, effectual oversight, a rogue appellate court panel, armed with the power to issue unpublished and effectively unreviewable opinions, is in practical terms, *the* court of last resort. As such, it can become, with little risk, effectively an accomplice to a politically popular, but, nevertheless, unconstitutional "theft ring" for private property.

This Court has jurisdiction under 28 U.S.C. § 1257 (App. H).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth and Fourteenth Amendments to the United States Constitution, along with pertinent federal and state statutes and rules are reproduced as Appendices H through O.

STATEMENT OF THE CASE

This case involves the politically popular refusal of the City of Pacifica ("City"), a virulently anti-development city,

to maintain one of its public streets, known as Edgemar Road ("Edgemar") thereby preventing access to and thwarting all economic use of the real property of petitioner North Pacifica ("NP"). NP owns seven lots in the City that are commonly referred to as the Fish lots, because they are located on a parcel that resembles a Fish. The sole access to the lots is via Edgemar, which is an abutting dedicated and accepted public, city street, which was improved in or about 1914 and was in regular and continuous physical use by the public as a thoroughfare for many decades.

Though the City never vacated Edgemar pursuant to the exclusive provisions of the California Streets and Highways Code for vacating or abandoning a public street, (and there is no other means recognized at law for vacating a public street) and, indeed, refused to vacate Edgemar when asked to do so by NP, the City, nevertheless, has not maintained Edgemar for many years and it is now overgrown, riddled with deep pot-holes and other obstacles, impassable to vehicular traffic and dangerous for pedestrian use. The City denied NP's application for a summary vacation of Edgemar and it has also refused to repair Edgemar, thus leaving the Fish lots effectively landlocked and depriving NP of all use and value of its property.

The trial court, after a six week bifurcated bench trial, which included a site visit by the Court, found that the City's refusal to repair and maintain Edgemar had permanently taken NP's property and awarded NP the full value of the lots in the amount of $3,495,000, plus approximately $1,200,000 in attorneys' fees and costs.

The California First Appellate District Court, Division Four, reversed the trial court in an unpublished opinion

based on its own "factual finding," which was contrary to the finding of the trial court, that the statutory limitation period had run. Under California Supreme Court precedent, the issue of the date on which the limitation period begins to run is an issue of fact that is specifically within the province of the trial court. (e.g., *Mehl v. People ex rel. Dept. Public Works*, 13 Cal.3d 710, 717 (1975)).[2] However, the appellate court brazenly overturned the trial court's decision based on the appellate courts own "finding" that the trial court's decision was not supported by the evidence, even though the trial below was a six week bench trial that had included a site visit, and copious expert testimony regarding the history of Edgemar including maps, aerial photographs etc.

In order to assert that the trial court's decision was not supported by the evidence, the appellate court simply ignored facts cited in the trial court's statement of decision (as well as all other trial evidence which supported the trial court's decision), as is apparent from a comparison of the two decisions. That the appellate court's unpublished opinion was a biased decision, designed to effectuate the politically popular anti-development sentiments of the vocal neighboring residents in Pacifica, is evident additionally from the appellate court's own concession, in the appellate opinion, that it relied on evidence *that was not in the record*, as well as from the appellate court's pervasive refusal to follow *stare decisis*, which is also apparent from the face of the decision.

---

[2] "The trial court's finding on the accrual of a cause of action for statute of limitations is upheld on appeal if supported by substantial evidence." *Institoris v. City of Los Angeles*, 210 Cal.App.3d 10, 17 (1989).

Background

NP is a small real estate developer in California, which has only two principals who comprise the entire company. Seven years ago, in 1998, NP acquired the rights to purchase a small undeveloped parcel of land, located in the City of Pacifica, which parcel is known as the "Fish," because its shape looks like a Fish. The Fish is approximately one acre in size.

The City of Pacifica ("City") is a small city on the coast of California, approximately 15 minutes south of San Francisco. The Fish is in a residential area in Pacifica that lies to the east of an elevation above the Pacific Ocean, and enjoys expansive views of the Pacific Ocean. The Fish is separated from the elevation by Palmetto Avenue, which is a main thoroughfare in northern Pacifica.

The area contains other residential development, including a stacked flat condominium project that was built in the 1970's, and which is located just northeast of the Fish. The condominiums are located on the slope of a hill above the Fish, and development of the Fish would not block the ocean views of the condominiums. Nonetheless, as NP has learned over the past seven years, there is strong local sentiment among the condominium residents and other neighbors against development of the Fish lots, and also against development of the "Bowl," an adjacent 4.2 acre parcel in the shape of a Bowl, that lies on the north side of Edgemar Road. In addition to owning the Fish outright, NP also owns the development rights to the Bowl and has experienced great animosity from the very vocal anti-development constituency in Pacifica. (Representatives of NP have had their tires slashed, etc. and NP's principals have, on occasion, been provided, for their

own protection, a compulsory police escort to their cars following controversial planning commission and city council meetings).

However, in 1998, when NP first contemplated purchasing the Bowl, the extent of the City's anti-development fervor was not apparent. NP saw instead a parcel of property that was appropriately zoned and designated under the City's general plan for residential use, and was in an area that had already been developed, and already had streets, etc., which seemed to be a unique opportunity for a small development of high-quality homes with stunning ocean views.

At the time that NP obtained the right to purchase the Fish, the property contained 17 ancient lots, which were small and irregular. Prior to purchasing the property in 1999, NP applied to the City for lot line adjustments to create ten legal lots out of the seventeen ancient lots. In order to obtain ten lots, NP also applied for a summary vacation of a small portion of Edgemar which abuts the seven lots.

The City denied NP's application for the street vacation of Edgemar, and thus limited NP to creating seven lots, rather than ten. All seven lots abut Edgemar, which is a dedicated and accepted public street, and which provides the sole means of access to the seven lots. At the time that it approved the lot line adjustments in 1999, the City issued Certificates of Compliance for the seven lots, which certify that the lots are legal lots and that the lots (including their access), are as depicted on the Certificates of Compliance which were recorded in the County records. *Each of the certificates includes a map that depicts Edgemar Road as providing sole access to each of the Fish lots.*

It is undisputed that the City had not repaired or maintained Edgemar for decades and that it, therefore, become unusable for vehicular access and dangerous for pedestrian use. Because Edgemar, in its neglected, overgrown and dangerous condition, was impassable and could not be used to provide access to the Fish lots and because the City exercised sole dominion over Edgemar (including its maintenance and repair or lack thereof), and NP needed access to its Fish lots in order to develop and/or sell them, NP, in October, 2001, made demand upon the City to repair and maintain Edgemar Road. Despite the fact that the City had earlier refused to vacate even a small portion of Edgemar Road, and despite the fact that the City had certified on the Certificates of Compliance that Edgemar Road would provide access to the Fish lots, the City nonetheless refused to repair Edgemar Road so as to provide access to NP's lots, and thus left the lots effectively landlocked and without any value.

Trial Court Decision

NP, therefore, brought its lawsuit against the City for inverse condemnation under the Fifth Amendment (as well as nuisance and breach of mandatory duty), on the grounds that NP, as an abutting property owner to Edgemar, a public and city street, had continuing abutter's rights to Edgemar which include an easement of access and the right to use Edgemar for ingress and egress to its property. The trial court agreed and held that:

> Plaintiff, as the owner of property abutting Edgemar Road, a public street, has, as a matter of law, an easement of access or the right to use it for purposes of ingress and egress to the property by such modes of conveyance and travel as

> are appropriate, customary, or reasonable, which right may not be taken away or destroyed or substantially impaired or interfered without just compensation therefore. *Rose vs. State of California*, 19 Cal. 2d 713, 726-728 (1942).

Statement of Decision, App. F-4.

The trial court's decision was also in line with the U.S. Supreme Court's holding regarding public, city streets:

> Municipal authorities, as trustees for the public, have the **duty** to keep their communities' streets **open and available** for movement of people and property, the **primary purpose to which the streets are dedicated.**

Schneider v. State, 308 U.S. 147, 160-161 (1939) (Emphasis added).

The trial court found that Edgemar is a public, city street that had been dedicated and accepted for public use in 1914. It further found that the County had expended public funds to construct and improve Edgemar Road and that the public had driven on and used Edgemar prior to the incorporation of the City of Pacifica (App. F-2). (In fact, in its trial and appellate briefs NP cited *sixteen* different ways in which Edgemar had been confirmed over time as a public street, including, in addition to the trial court's findings, the fact that it fit the definition of a public and city street under the City's own municipal code and the definitions of the California Streets and Highways Code and that the City, itself, had *admitted* that Edgemar was a public street within the City's jurisdiction and the City had even formally vacated a *different segment* of Edgemar Road utilizing the proper statutory procedures, thus, affirmatively electing to keep this segment in a non-vacated state).

The City claimed that it did not have a duty to provide access to the Fish Lots precisely *because* it had not made any effort to maintain Edgemar for decades. In short, it argued that by neglecting its duty to repair and maintain Edgemar, which had resulted in Edgemar becoming impassable, it had succeeded in "physically abandoning" or "vacating" Edgemar so that it was no longer a public street. Thus the issue at trial became whether or not Edgemar was still a public, city street.

Edgemar Is a City Street That Has Never Been Vacated

The City itself had admitted in its answer that Edgemar had been improved as a public street "sometime in the past" and, in its opinion, the appellate court acknowledged that the City had conceded that "Edgemar was a public County road sometime prior to 1954." (App. B-4).

When a City incorporates territory that includes a dedicated and accepted public county road, the county road becomes a city street (Streets & Highways Code § 989(a) (App. L)). Edgemar was within the City limits when the City incorporated in 1957. The trial court therefore found that Edgemar became a City street upon the City's incorporation:

> Edgemar Road became a city street of the City of Pacifica when in 1957 the City was incorporated, the Edgemar Road being within the City limits. See section 989 of Streets and Highways Code and the Historical and Statutory Notes thereto.

Statement of Decision (App. F-2).

Thus the issue was whether Edgemar had ever ceased to be a public street. The California Supreme Court has

held that the provisions of the Streets and Highways Code §§8500 *et seq.*, are the *exclusive* method by which a street can be vacated:

> [I]f the Legislature has provided a method by which a county or city may abandon or vacate roads, that method is *exclusive*.

County of San Diego v. California Water & Tel. Co., 30 Cal.2d 817 (1947). "The Legislature, for the protection of the public, has declared that a road *may not be abandoned without notice*, a *hearing*, and a *finding* that the road is *unnecessary* for present or prospective public use." Id., p. 826. Abandonment of a street must be accomplished in the manner provided by statute since streets are in law the property of all of the people of the state. *Clay v. City of Los Angeles*, 21 Cal.App.3d 577 (1971).

The trial Court rejected the City's argument that it had "vacated" Edgemar by means of failing to maintain it:

> Although Defendant claimed that it had *vacated* Edgemar Road, *the evidence proved otherwise*. Plaintiff, as the owner of property abutting Edgemar Road, a public street, have the right to expect its continued existence. *Vacation or abandonment* of a public street *must be accomplished in the manner provided by statute* since streets are in law the property of all of the people of the state. *Clay vs. City of Los Angeles*, (1971) 21 Cal.App. 3d 577, 587. It is ***undisputed*** that Edgemar Road has ***never been formally vacated*** by the City ***in any legal manner.*** Even in 1998, the City exercised dominion over it when it rejected Plaintiff's application for a summary street vacation thereof.

Statement of Decision (App. F-2).

The trial court further noted that the City itself had represented to the public, including NP, that Edgemar Road was a street which provided ingress and egress to the Fish lots:

> And, in 1999, the City issued Certificates of Compliance for each of Plaintiff's seven lots abutting Edgemar Road that were recorded in the official records of the County of San Mateo, which Certificates depict Edgemar Road as intersecting Palmetto Avenue which is undisputedly a public street and thereby providing the only access to the Plaintiff's property via the public street system. One of the purposes of such recordation is to provide notice to the public of the matters certified by the City in the Certificates of Compliance, including, expressly, the City's certification that such lots abut and enjoy access through Edgemar Road. By issuing the Certificates indicating that the Plaintiff's lots were legal lots, the City certified, via Pacifica Municipal Code section 9-4.218 and 9-4.253, that each had its principal frontage on a public street, road, highway, or private road approved by the City. The maps appurtenant to the Certificates show each lot abutting on Edgemar Road. Plaintiff purchased the lots after the Certificates were recorded.

Statement of Decision (App. F-3).

Trial Court Decision re Statute of Limitations

The City argued that because it had stopped maintaining Edgemar well before NP purchased the property, the statute of limitations had run on any action arising from the City's failure to repair and maintain Edgemar. However, the trial court found that NP's action for inverse condemnation had not accrued until October, 2001, when

the City refused NP's demand that the City repair and restore Edgemar so as to provide access to the Fish lots:

> Plaintiff does not lack standing to bring the inverse condemnation action because at the time it acquired its interest, Edgemar Road was in its current condition. The City argues that if there was any taking, the damage occurred to some predecessor in interest to Plaintiff. Accrual of a cause of action for inverse condemnation occurs "as of the point in time when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property: *Smart vs. City of Los Angeles*, 112 Cal.App. 3d 232, 235 (1980). Here, the substantial interference with the Plaintiff's use came about when, after refusing Plaintiff's request to vacate Edgemar Road, the City, in October 2001 further refused the Plaintiff's demand that it repair and maintain Edgemar Road.

Statement of Decision (App. F-4).

The Trial Court Found a Taking But Gave the City the Opportunity to Restore Edgemar

The trial court found that the City had denied NP all use of its property and had rendered it "worthless," however, prior to the damages phase of the trial, it gave the City the opportunity to convert the taking to a temporary taking by restoring Edgemar Road. The City did not take advantage of the opportunity:

> After the interlocutory determination and decree herein that the condition of Edgemar Road constituted a taking by the City of Plaintiff's property, the City had the opportunity to make the taking temporary by undertaking their duties of

> repair and maintenance. The interlocutory judgment provided the City with an opportunity to exercise its right to elect to rescind the permanent taking by restoring Edgemar Road and paying damages for a temporary taking. Such did not occur and thus the taking by the City is a total permanent taking (App. F-5).

The Court awarded just compensation for the seven lots in the amount of $3,495,000 (App. F-6). Additionally, since the City had refused to restore Edgemar and it continued to be in an obstructed and dangerous condition, the Court ordered the City to abate the nuisance, and specifically found that the condition of Edgemar was a continuing nuisance that could be abated at any time:

> *The nature of the nuisance is such that it could have been discontinued at any time by the City undertaking its duties of repair and maintenance.* With entry of the interlocutory decree here finding said nuisance to exist, the City was given the opportunity to abate said nuisance. The City did not take up the opportunity and the nuisance continues. The City is hereby ordered to abate said nuisance within six months of the judgment in this action becoming final.

(App. F-7).

The City refused to restore Edgemar. Instead, the City appealed the trial court's judgment to the appellate court. As set forth below, the appellate court ignored the above findings of the trial court, substituted its own findings of fact, and relied on evidence outside the record in order to avoid requiring the City to pay for the taking.

REASONS WHY THE COURT SHOULD TAKE THIS CASE

I. BECAUSE OF THE "RIPENESS" REQUIREMENT OF *WILLIAMSON*, UNPUBLISHED STATE COURT APPELLATE OPINIONS CAN DEFEAT THE CONSTITUTIONAL RIGHT TO TAKINGS' COMPENSATION.

The Fifth Amendment's guarantee of just compensation for a taking is the only civil right that is considered to be self-executing, that is, a plaintiff has the right to sue for compensation for a taking directly under the Fifth Amendment. Ironically, however, under *Williamson* and *San Remo*, it is the only civil right that cannot be enforced in Federal Court.

All other civil rights set forth in the Constitution and its amendments may be enforced by means of the Civil Rights Act, 41 U.S.C. §1983. [App. M]. The Civil Rights Act was specifically enacted to provide for federal jurisdiction over civil rights, in order to safeguard them from local courts:

> A major factor motivating the expansion of federal jurisdiction through §§ 1 and 2 of the [Civil Rights] bill was the belief of the 1871 Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights. [Citations omitted] This Congress believed that federal courts would *be less susceptible to local prejudice* and to the existing defects in the factfinding processes of the state courts.

Patsy v. Bd. of Regents, 457 U.S. 496, 505-506 (1982) (Emphasis added).

> The Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era. During that time, *the Federal Government was clearly established as a guarantor of the basic federal rights of individuals against incursions by state power.* As we recognized in Mitchum v. Foster, 407 U.S. 225, 242 (1972) (quoting Ex parte Virginia, 100 U.S. 339, 346 (1880)), "[*the*] *very purpose of § 1983 was to interpose the federal courts between the States and the people*, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" (*Patsy, supra*, 503 (Emphasis added)).

Here, NP's situation clearly illustrates the wisdom of allowing enforcement of individual civil rights in federal court, since the California appellate court has allowed its prejudice in favor of local governments to overcome its duty to provide compensation for a taking under the U.S. Constitution. The face of the appellate court's unpublished decision, when compared to the trial court's findings, reveals the appellate court's bias in favor of the City, and is exactly the result that the Civil Rights Act was enacted to prevent. In light of *Williamson* and *San Remo*, the appellate court's unpublished and biased decision ensured that NP would be powerless to enforce its constitutional right to just compensation from the City for the City's taking of all use of NP's Fish lots.

The Biased Appellate Court's Unpublished Opinion

The appellate court took advantage of its ability to decide NP's case by means of an unpublished opinion, and ignored the trial court's findings of fact in order to reach the conclusion that it desired. This was contrary to law, but given the virtual impossibility that its unpublished opinion would be reviewed by the California Supreme Court, the appellate court was safe in concluding that it could act with impunity.

In California as in the Federal Courts, and, most probably every other state, the trial court's findings of facts are entitled to great deference, and, under binding California Supreme Court precedent an appellate court cannot overturn a finding of fact *except* on a determination that there is *no* substantial evidence to support the trial court's findings.

> [W]here the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is any substantial evidence to support them; that we have **no power to judge of the effect or value of the evidence**, to weigh the evidence, to consider the credibility of the witnesses, or to resolve **conflicts** in the evidence or in the reasonable inferences that may be drawn therefrom.

Primm v. Primm, 46 Cal.2d 690, 693 (1950) (Emphasis added).

> Even though contrary findings could have been made, *an appellate court should defer to the factual determinations made by the trial court when the evidence is in* ***conflict***. This is true whether the trial court's ruling is based on oral testimony or declarations.

Shamblin v. Brattain, 44 Cal.3d 474, 479 (1988) (Emphasis added).

California Supreme Court precedent is binding on the appellate court, which has *no power* to overturn the holdings of the Supreme Court:

> The Court of Appeal must follow, and *has no authority to overrule*, the decisions of this court.

People v. Birks, 19 Cal.4th 108, 116 (1998).

In this case, however, the appellate court *admitted* that there was *conflicting evidence* as to the status of Edgemar, and nonetheless reversed the trial court:

> The evidence of Edgemar's fate following 1954 is confused and *conflictual*.

Appellate Opinion (App. B-4).

Under the doctrine of *stare decisis*, the appellate court had *no power* to resolve conflicts in the evidence. However, rather than defer to the trial court's finding that Edgemar became a city street in 1957, when the City was incorporated, and that Edgemar had never been vacated (*supra*), the appellate court instead resolved the conflicting evidence to determine and, thereby to hold that Edgemar had been "cut-off" and/or "closed" by the construction of Highway 1 sometime before November 1957. In doing so the appellate court relied on the City's mischaracterization of evidence *outside of the record*, and based on that "evidence," resolved the issue of the status of Edgemar against NP.

> The City has directed our attention to a 1954 freeway agreement between the State and County in which the County agreed to the closing and reconstruction of County roads, including

> Edgemar, with the County to resume control and maintenance of reconstructed roads upon Highway 1's completion and notice to the County to resume control. However, the City presented the freeway agreement on an unsuccessful pretrial motion for summary judgment and **did not introduce the agreement at trial**.

Appellate Opinion (App. B-5).

Since the agreement was not introduced at trial, it was unauthenticated, and NP had no opportunity to introduce expert witness testimony as to its meaning, or to cross-examine the City's witnesses. Nor did the appellate court take judicial notice of the "freeway agreement," since that would necessarily have given NP the opportunity to rebut the court's "interpretation" of the agreement.[3],[4]

Since the "freeway agreement" was not part of the trial record, and since the appellate court did not take judicial notice of the agreement, the appellate court had no grounds whatsoever to rely on the "freeway agreement" in its opinion. Nonetheless, based on the appellate court's "interpretation" of the "freeway agreement," which was completely inaccurate and biased, the appellate court held that Edgemar had been "closed" and /or "abandoned":

---

[3] California Evidence Code § 459(d) requires the appellate court to give the parties a reasonable opportunity to present relevant information on the propriety and tenor of judicial notice (App. N).

[4] In fact, the "freeway agreement" does not reference Edgemar by name, and the map attached to the agreement shows that the construction of highway 1 did not affect the portion of Edgemar at issue in this lawsuit. No doubt that is the reason that the City did not introduce the "freeway agreement" at trial.

> The privotal point of controversy, however, is the trial court's finding that Edgemar was *never lawfully vacated*. That finding is contrary to the evidence that the State closed Edgemar for construction of Highway 1 before the City acquired Edgemar . . .

Appellate Opinion (App. B-21).

In fact, there was *no* evidence in the record that, prior to the City's incorporation in 1957 the State had "closed" and/or "abandoned" and/or "vacated" Edgemar according to *any* statutory procedures. For this reason the trial court found that Edgemar had become a City street upon the City's incorporation (*supra*).

Nonetheless, even though the appellate court conceded that the 1954 "freeway agreement" was not in the record, and even though the appellate court even admitted that the trial court was correct in finding that the City had never vacated Edgemar Road "[T]he City ***did not abandon 'the Edgemar fragment' fronting NP's property***" (App. B-21), the appellate court nonetheless continually recited throughout its decision that Edgemar had been "closed" and "***abandoned***," by the construction of Highway 1:

> 1. "Edgemar Road is a fragment of roadway . . . that has not been maintained or connected to the public street system since 1967, at the latest, following its ***closure*** during construction of Highway 1." (App. B-1).
>
> 2. "In the 1950's, the State of California (State) constructed Highway 1 and, in connection with that highway construction, physically ***closed*** Edgemar." (App. B-4).

> 3. "Holmes testified that the highway construction included the ***closure*** of Edgemar in late 1956 . . . " (App. B-4).
>
> 4. "There is a separate controversy over whether the State after ***closing*** the existing connection . . . " (App. B-6).
>
> 5. "Despite this concession, NP maintains that the damage caused by the ***closure*** of Edgemar was not appreciable until October 2001." (App. B-11).
>
> 6. "The ***closure*** of Edgemar was not a minor or temporary impairment of access." (App. B-12).
>
> 7. "Edgemar was fragmented when the City acquired it and any access to the public street system was ***abandoned*** by ***statutory process*** decades before NP bought undeveloped property abutting Edgemar." (App. B-22).

The actions of the appellate court in unabashedly citing the 1954 freeway agreement, and relying on its alleged contents to overturn the trial court's findings of fact reveal clearly that (a) the appellate court was biased in favor of the City and would do whatever was necessary to reverse the trial court and (b) the appellate court had no fear whatsoever of having its unpublished opinion overturned.

Moreover, the "freeway agreement" is not the only incident in the appellate court's opinion wherein the appellate court admittedly relied on evidence outside the record. As noted, the trial court also found that the condition of Edgemar constituted a *continuing* (i.e., reasonably abatable) nuisance, and ordered the City to abate the nuisance. The trial court found that the nuisance could

have discontinued at any time, *supra*. The appellate court overturned the trial court **based on the alleged *deposition* testimony** of NP's expert:

> While there were varying estimates of the cost of restoration, NP's expert testified at his deposition that the cost could be as high as $600,000. (App. B-18).

Indeed, *the City's own trial evidence* showed that the nuisance could be abated for *less than $20,000*, or less than $2,860 per lot. The appellate court disregarded such evidence in its "holding" overturning the trial court, that the nuisance was not *reasonably* abatable because its cost of abatement would be too high, though such evidence of the lower, indeed, *de minimis* cost of abatement had been presented at trial by the City, itself.

Thus the appellate court impermissibly usurped the trial court's function by resolving conflicts in the evidence, i.e. the "*varying* estimates of the cost" in favor of the City and admittedly did so by relying on *deposition* testimony, which was never presented at trial, but rather, only referred to (inaccurately) in defendant's appellate brief, rather than the trial evidence.

II. IN CALIFORNIA, THE COMBINATION OF UNPUBLISHED OPINIONS AND THE LACK OF ANY PROCEDURE FOR DISQUALIFICATION OF AN APPELLATE PANEL FOSTERS VIOLATIONS OF DUE PROCESS AND EQUAL PROTECTION.

As noted above, the appellate court in this case, refused to follow *stare decisis* and instead conducted its own, *ex parte, in camera*, mini-trial, ignoring the trial

court's evidence and relying instead on its own interpretation of "evidence" that had never been presented at trial. In the context of a determination as to whether or not a public street exists, the appellate court's actions do not harm only NP, they harm all property owners in California, in that it is impossible to determine property rights, where an appellate court may abrogate such rights by means of an unpublished opinion that is contrary to existing law including U.S. and California Supreme Court precedent.

The United States Supreme Court itself has confirmed that the doctrine of *stare decisis* is most important in this area:

> Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved [citations omitted].

Payne v. Tennessee, 501 U.S. 808, 828 (1991)

> Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds.

Bush v. Vera, 517 U.S. 952, 985 (1996)

Here, it is undisputed there was no recorded vacation of Edgemar, and thus NP, as any other prospective buyer, should have been entitled to rely upon California Supreme Court precedent that, absent a recorded vacation, Edgemar remained a public street, especially in light of the City's *own* recordation of the certificates of compliance and the City's certifications therein of the truth of the contents of such certificates. Instead, however, the appellate court

made up the law in order to accomplish its ends and provide a politically popular reversal of the trial court's judgment and save the City and its taxpayers/voters the cost of paying just compensation.

NP had no defense against the appellate court's unpublished decision. If the decision had been published, it would have been contrary to existing Supreme Court precedent, and in conflict with decisions from other appellate courts, and thus in a category more likely to be reviewed by the California Supreme Court. It would have also provided public notice to the world, that, according to the appellate court, Edgemar Road had been "abandoned" (notwithstanding that no such abandonment or vacation occurred pursuant to the only legal means of effecting same, the Streets and Highways Code). Such public notice, might have garnered other judicial challenges by other members of the public adversely affected by an "abandonment" of a public street without compliance with the exclusive statutory requirements (including notice and just compensation) therefor.

Without such publication, the appellate court's ruling that Edgemar had been "closed" and/or "abandoned" applies only to NP and to no other member of the public, and, thus, only NP is denied access via Edgemar, and only NP was deprived of its right to notice and just compensation for the "abandonment" of a public street. To the rest of the world, Edgemar Road remains a public, city street which has never been vacated to which the public has a right of open, unobstructed access and continuing maintenance by the City. To NP, however, due to the unpublished decision that applies to NP and NP alone, Edgemar Road is "closed" and "abandoned." This constitutes a violation of NP's right to equal protection to enjoy public streets in the

same manner as any other citizen of California. However, NP's request to publish the decision, in order to cast public light upon it, was denied by both the appellate court and the Supreme Court (App. A & E).

Furthermore, even when it became apparent that the panel might probably have been biased against NP, California law provides for no procedure to disqualify an appellate panel. NP had learned that the City, in order to prejudice the appellate panel against NP, had submitted confidential settlement materials to the appellate panel herein. Although NP requested that the panel, on that ground, recuse itself the panel denied the request (App. C).

Another aspect of this case that raised troubling due process and equal protection issues involves a separate appeal that NP filed involving the California Coastal Commission "Coastal Commission appeal." Although the Coastal Commission appeal was filed many months prior to the City's appeal herein, and did not involve the Fish or the City, both the Coastal Commission appeal and the within case were assigned to the very same three member panel of the appellate court, even though the assignment to any particular panel is supposed to be random.

The First Appellate District Court has five divisions, thus it would be rare that both appeals would be assigned to the same division. Additionally, each division has four justices, of which only three sit on any particular panel. In this case, not only were both appeals assigned to the same panel, but the same justice, Patricia Sepulveda, was assigned to write both opinions. The odds against this happening as a random event are less than 1 out of 400.

When the opinion in the Coastal Commission appeal was filed on December 23, 2004, that decision relied on

evidence outside the record, to wit, a representation (inaccurate) of fact made by counsel for the Coastal Commission at the oral argument.

The Coastal Commission appeal raised issues that were related to a pending appeal before the California Supreme Court, *Marine Forests Society vs. California Coastal Commission*, and even though it was unpublished, NP was hopeful that the Supreme Court might at least grant and hold its appeal pending the Supreme Court's decision in *Marine Forests*.

However, NP and its attorneys felt constrained in preparing an argument for the Supreme Court that was critical of this appellate panel for relying on evidence outside the record while, at the same time, the very same panel was considering the City's appeal herein seeking to vacate NP's multi-million dollar just compensation award, which, with the stroke of a pen could be erased by an appellate panel whose sensibilities might be offended by anything said in NP's Coastal Commission appeal to the Supreme Court. NP believed that having the same, supposedly, randomly selected panel decide the instant case, while NP was still in the course of attacking, by appeal, that panel's decision in the Coastal Commission, case chilled NP's First Amendment rights, and NP submitted declarations to that panel from other attorneys who confirmed they would feel similarly constrained under the same circumstances. The appellate panel also denied the request for recusal based on those grounds.

Although California provides for a disqualification procedure for *trial judges* which involves a review of the parties' evidence of bias, etc. there is no such procedure for an appellate panel. This lack of a procedure for disqualification coupled with the appellate panel's right to issue

unpublished opinions presents an unchecked opportunity for the denial of due process and equal protection.

Here, NP had no notice of the law that the appellate court would apply, because it simply made up the law. Further, in making up law to apply to NP's case only, the appellate court clearly denied NP equal protection. The Fifth Amendment right to just compensation for a taking should not be so easily susceptible to public pressure and the political winds, since it is precisely that abuse that the Fifth Amendment was enacted to prevent.

CONCLUSION

Constitutional rights are meaningless if they cannot be enforced. The confluence of this Court's rulings in *Williamson* and *San Remo* with California's system allowing unpublished opinions and providing no procedure for disqualification of appellate panels eviscerates the Fifth Amendment guarantee of just compensation to such an extent that it is a meaningless concept in California. For all these reasons NP respectfully requests that this Court grant *certiorari* and decide whether it is constitutional for a state court appellate panel to overturn an inverse condemnation judgment by means of an unpublished opinion, where there is no provision for disqualification of the appellate panel.

Respectfully submitted,

JAQUELYNN POPE*
KEITH FROMM

Counsel for Petitioners

**Counsel of Record*

TABLE OF APPENDIX CONTENTS

California Appellate Court

March 23, 2005 Opinion A104951 ..... A1

January 6, 2005 Order Denying Request for Recusal B1

February 1, 2005 Order Denying Request for Recusal C1

April 18, 2005 Order Denying Petition for Rehearing and Request for Publication D1

California Trial Court

November 12, 2003 Statement of Decision E1

March 3, 2004 Judgment F1

California State Supreme Court

June 15, 2005 Order Denying Review and Denying Request for Publication G1

Constitutional Provisions, Statutes, Rules

28 USC §1257 ..... H1

28 USC §2101 ..... I1

The Fifth Amendment J1

The Fourteenth Amendment K1

Calif. Streets & Highways Code 989 ..... L1

42 USC §1983 ..... M1

Calif. Evidence Code § 459 ..... N1

Calif. Rules of Court Rule 977 ..... O1

Filed 3/23/05 North Pacifica LLC v. City of Pacifica CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

NORTH PACIFICA, LLC, Plaintiff and Appellant v. CITY OF PACIFICA, Defendant and Appellant.	A104951, A106446, A107347 (San Mateo County Super. Ct. No. CIV 419575)

North Pacifica, LLC (NP) is a real estate developer that purchased undeveloped land abutting Edgemar Road (Edgemar) in the City of Pacifica (City) in 1999. Edgemar is a fragment of roadway no longer than 1,000 feet that has not been maintained or connected to the public street system since 1967, at the latest, following its closure during construction of Highway 1. Edgemar is now in the condition of an overgrown field, with "degraded pavement, vegetation up to eight feet high growing through its center," and piles of dirt obstructing passage.

NP brought an action against the City for inverse condemnation, nuisance, declaratory relief, and writ of mandate upon allegations that the City has a mandatory duty to repair Edgemar and reopen it to vehicles. The trial court agreed, and entered judgment in favor of NP awarding it $3.495 million in compensation for a taking of property, and ordered the City to abate the nuisance by reopening Edgemar as a public street. The court also awarded NP almost $1.2 million in attorney fees and costs.

We conclude that NP's causes of action for inverse condemnation and nuisance are time-barred, and the City does not have an obligation to reconstruct a road that it never maintained as a through road. Accordingly, we reverse the judgment and postjudgment award of fees and costs, and remand with directions to enter judgment in favor of the City on all causes of action.

FACTS

A. NP purchased unimproved property abutting an abandoned road.

Plaintiff NP is a real estate developer, whose two members are Keith Fromm and Robert Kalmbach. In 1999, NP purchased unimproved property in the City for approximately $350,000. In the purchase agreement, NP acknowledged that it would inspect the property and the seller disclaimed any warranty or representations concerning access to public roads.

The parties refer to NP's property as the "Fish property," because its boundaries form the shape of a fish. The property is about one acre in size and consists of multiple parcels subdivided in 1914. During escrow, the City granted NP's application for a lot line adjustment and

certified seven parcels as compliant with current subdivision law. NP's seven parcels of undeveloped land abut Edgemar, which was physically abandoned decades ago and is in the state of an overgrown field. As described more fully below, the Fish property has not had any vehicular access since 1967 at the latest, more than 30 years before NP bought the property. NP's principal, Fromm, admitted at trial that he visited the property before NP purchased it, and knew that vehicles were not making use of the neglected right-of-way.[1]

B. The history of Edgemar.

The trial court found that the County of San Mateo (County) accepted a dedication of Edgemar for public use in 1914, and that the road was used by the public as a County road through the early 1950s. The City concedes, for purposes of this appeal, that Edgemar was a public County road sometime prior to 1954. The evidence of Edgemar's fate following 1954 is confused and conflictual.

In the 1950s, the State of California (State) constructed Highway 1 and, in connection with that highway construction, physically closed Edgemar. Edgemar was reduced to isolated fragments of physically abandoned roadway without connection to any public street system.

---

[1] NP also holds development rights in unimproved property on the other side of Edgemar, across from the Fish property, called the Bowl property. NP intends to build 43 residential units on the Bowl property's 4.2 acres, and its vesting tentative map for the project requires NP to develop Edgemar as an access road to that subdivision. The Bowl property is the subject of separate litigation on an unrelated dispute over appealability of a coastal development permit. (See *North Pacifica, LLC v. California Coastal Commission* (Dec. 22, 2004, A101434) [nonpub. opn.].)

According to the City's public works director and City engineer, Scott Holmes, Highway 1 was constructed between 1955 and 1958. Holmes testified that the highway construction included the closure of Edgemar in late 1956, when it was "buried under close to a hundred feet of fill." Holmes explained that Edgemar was further obstructed by the State's placement of "a steel guard rail and a fence that blocks Edgemar Road at the edge of their concrete spillway." NP's civil engineering expert, Louis Arata, agreed that Edgemar was "cut off" by Highway 1 sometime before November 1957, when the City was incorporated.

Edgemar's legal status during and after the Highway 1 construction is unclear on this record. The City has directed our attention to a 1954 freeway agreement between the State and County in which the County agreed to the closing and reconstruction of County roads, including Edgemar, with the County to resume control and maintenance of reconstructed roads upon Highway 1's completion and notice to the County to resume control. However, the City presented the freeway agreement on an unsuccessful pretrial motion for summary judgment and did not introduce the agreement at trial. There was admitted at trial a relinquishment of highway right-of-way, dated 1966, in which the State references the 1954 freeway agreement and relinquishes specified reconstructed roads formerly within the County's geographic boundaries and now lying within the recently incorporated City's boundaries. Edgemar was not part of this relinquishment, with the exception of a small section of property known as parcel 6 that extends onto Edgemar.

Edgemar was physically transformed by the State's Highway 1 construction, although the exact nature of the

transformation is disputed. NP claims that the State's highway construction closed an intersection that had existed at Edgemar and Palmetto Boulevard (Palmetto) near the property at issue in this appeal. The claim was disputed by public works director Holmes, who testified that Edgemar and Palmetto never intersected near the subject property, although the two roads did intersect about a "half mile south of the project" before the highway construction in 1956. When examined about the NP project site, NP's expert, Arata, conceded that he did not know "whether there was ever a traversable intersection at Palmetto and Edgemar."

On appeal, NP relies upon the lay testimony of Fromm, one of NP's principals, who testified that he believed there was an intersection between Edgemar and Palmetto near the project site in 1921 or 1922, based upon his review of maps and a court case discussing the geographical area as it existed in the 1920s. Fromm also testified that Palmetto, as it exists today, shows a curb break near Edgemar that is suggestive of a former intersection. However, Fromm conceded that there is a distance of at least 20 feet between the break in the curb of Palmetto and the pavement of Edgemar, and that distance is obstructed by vegetation and other impediments. NP's engineering expert estimated the horizontal distance between Edgemar and Palmetto at 40 feet, with a vertical elevation difference between the two roads of 18 feet.

There is a separate controversy over whether the State, after closing the existing connection between Edgemar and the public street system for construction of Highway 1, built a new access road between Edgemar and Palmetto. According to the City's engineering manager, Van Ocampo, the State acquired private property near the

NP project site, known as parcel 6, in 1954 or 1955. A paved road was placed on parcel 6 sometime in the 1950s or 1960s, but the road was short lived. The State relinquished parcel 6 to the City in 1966, and the City vacated parcel 6 and its public right-of-way in 1967, transferring the property back to the original owner.[2]

C. The present condition of Edgemar.

There has been no vehicle access between the Edgemar fragment that fronts the NP project site and a public street system since 1967, at the latest. The Edgemar fragment at issue in this case is 750 to 1,000 feet long. There are no houses or improvements of any kind along Edgemar. As NP notes in its briefing on appeal, Edgemar has "degraded pavement, vegetation up to eight feet high growing through its center," and piles of dirt obstructing passage. The parties are agreed that Edgemar is impassable and has not been maintained for decades. The City, which was not incorporated until 1957, after construction of Highway 1 obstructed Edgemar, has never maintained Edgemar. There is testimony that Edgemar does not appear on the Thomas Brothers' Guide Map, or the Internet's MapQuest. Edgemar has not appeared on the City's official street maps since at least 1972.

NP's engineering expert conceded that Edgemar would require "complete reconstruction[,] not repair" for vehicle access. Edgemar has not been maintained for at least 50 years. Edgemar is without sidewalks and street lights. The road would have to be regraded, repaved, and

---

[2] Parcel 6 is now owned in common with the Bowl property, and NP plans to build houses on it.

widened. A new intersection between Edgemar and Palmetto would also need to be created, and that intersection would have to overcome an 18 foot vertical gap between the two roadways.

TRIAL COURT PROCEEDINGS

On October 17, 2001, NP wrote a letter to the City demanding that the City restore access to NP's Fish property abutting Edgemar. On November 6, 2001, NP filed a formal claim for damages with the City. The City denied NP's claim on November 30, 2001.

NP initiated this lawsuit on December 19, 2001, pleading causes of action for inverse condemnation, nuisance, declaratory relief, and writ of mandate. A bench trial was bifurcated into liability and damages phases. Liability issues were tried in January 2003, and damages were tried in June 2003.

The trial court entered judgment in favor of NP on March 3, 2004. The court found that the City has a mandatory duty to maintain Edgemar, and that its breach of that duty resulted in both a nuisance and a taking of property. The court awarded NP $3.495 million in compensation, and ordered the City to abate the nuisance by repairing and maintaining Edgemar as a public street. The court also awarded NP prejudgment interest upon the compensation award, dated from the commencement of the damages phase of trial. In a postjudgment order, the court awarded NP $992,933 in attorney fees and $189,513.60 in costs. The City appealed the judgment and postjudgment fee and cost award (A104951 and A107347, respectively), and NP cross-appealed claiming entitlement to a greater amount of prejudgment interest (A106446).

DISCUSSION

A. Inverse condemnation.

"Private property may be taken or damaged for public use only when just compensation" is paid to the owner. (Cal. Const., art. I, § 19.) Property rights include a right of access, and thus the substantial impairment of a property owner's right of access to public streets by the construction of public works is compensable as a taking of private property in an action for inverse condemnation. (*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663; *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 349-355.) As the California Supreme Court has long recognized, an "urban landowner enjoys property rights, additional to those which he exercises as a member of the public, in the street upon which his land abuts. Chief among these is an easement of access in such street. [Citations.] This easement consists of the right to get into the street upon which the landowner's property abuts and from there, in a reasonable manner, to the general system of public streets." (*Breidert, supra*, 61 Cal.2d at p. 663, fn. omitted.)

We need not address whether a claim of failure to maintain an unusable fragment of a public road can constitute inverse condemnation because it is equally well settled that statutes of limitations apply to inverse condemnation actions for damage to property (three years) or a physical taking of property (five years). (Code Civ. Proc., § 338, subd. (j); *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 167; *Patrick Media Group, Inc. v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 607.) A cause of action for inverse condemnation accrues "when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his

property" (*Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232, 235) and the damage is "sufficiently appreciable to a reasonable man." (*Mehl v. People ex rel. Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 717.) Here, the trial court found that NP timely instituted suit in December 2001 because substantial interference with NP's use of the property was not appreciable until October 2001, when the City refused NP's demand to restore Edgemar.

The trial court's finding is unsupported by the evidence, which established that there were decades of obvious and substantial interference with the property's use and enjoyment that preceded NP's acquisition of the property and demand to restore Edgemar. NP's civil engineering expert admitted at trial that Edgemar was "cut off" by Highway 1 sometime before November 1957. The State may have constructed alternative access to the public street system after closing Edgemar, across parcel 6, but that access road was vacated in 1967. The evidence is uncontradicted that there has been no vehicle access between Edgemar and the public street system since 1967, at the latest. NP inspected the property before purchasing it, and saw that Edgemar provided no vehicle access. NP concedes on appeal that Edgemar's physical condition is "substantially impaired" and has been for decades.

Despite this concession, NP maintains that the damage caused by the closure of Edgemar was not appreciable until October 2001. NP argues on appeal that the property might have been held by the previous owner for "speculation and appreciation," or for "hiking, and/or camping," and thus "any impairment of vehicular access would have been irrelevant" until NP bought the property and decided

to develop it as residences. NP's denial of appreciable harm by the closure of Edgemar is untenable.[3] The Fish property abutting Edgemar was a subdivision approved in 1914. The property is currently zoned residential, and nothing in the record suggests that the property ever had another use. The loss of vehicle access to urban property, especially residential property, is not "irrelevant" whether the property is intended for immediate development or held for future appreciation of value.

The damaging loss of all present and foreseeable future vehicular access was "sufficiently appreciable to a reasonable man." (*Mehl v. People ex rel. Dept. Pub. Wks., supra*, 13 Cal.3d at p. 717.) The closure of Edgemar was not a minor or temporary impairment of access. Edgemar was "buried under close to a hundred feet of fill" during freeway construction, and the State placed "a steel guard rail and a fence that blocks Edgemar Road at the edge of their concrete spillway." Any alternative vehicle access provided by parcel 6 was lost in 1967, when parcel 6 was vacated by the City and returned to private ownership.

The evidence compels the conclusion that the challenged taking of private property occurred in 1967, at the latest. Any action for inverse condemnation thus accrued decades ago, and in favor of the previous owner of the subject property. The right to recover in inverse condemnation inures "in the person who owned the property at the time of the taking or damaging, regardless of whether

---

[3] NP denies that the harm caused by Edgemar's closure was sufficiently appreciable to trigger the statute of limitations, but seems to acknowledge the significance of the harm when arguing for damages: "Obviously, since no use of the Lots could be made without access, the value of the Lots without access was zero." (Underscoring in original.)

the property is subsequently transferred to another person." (*City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 389.) As explained in a related context, "for limitations purposes the harm implicit in a tortious injury to property is harm to the property itself, and thus to *any* owner of the property once the property has been injured and not necessarily to a particular owner. Thus once the sewer line has been improperly located on the property [citation], or the lot preparation and foundation construction have been improperly done [citation], or the encroaching buildings are constructed [citation], the tort is complete and the statute of limitations (unless forestalled by the 'discovery rule' or some other special doctrine) begins to run: An owner must bring its claim to court within the statutory period or the claim will be barred *for that and all subsequent owners*. Normally, a subsequent owner will not be personally harmed by the tort until he or she becomes the owner, but no case has held that each new owner thus becomes entitled to a new statute of limitations against the tortfeasor. Such a rule would wholly disregard the repose function of statutes of limitations." (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1534-153, italics in original.)

NP argues that the rule precluding the resetting of the statute of limitations for successive property owners applies only to tortious injury to real property addressed in *CAMSI IV v. Hunter Technology Corp., supra*, 230 Cal.App.3d 1525, not a governmental taking of property. We disagree. Absent a contractual assignment of rights between successive property owners, the right to recover compensation for a governmental taking resides in the owner at the time of the taking. (*City of Los Angles v. Ricards, supra*, 10 Cal.3d at p. 389; accord 2 Nichols on

Eminent Domain (rev. 3rd ed.2004) § 5.01[5][d][i], pp. 5-37-5-40.) Where an owner suffers a taking of property by being denied access to his or her property, it is the owner at the time of the taking who is entitled to compensation, not a subsequent owner who undoubtedly buys the property at a price that reflects the impaired access. (*Ricards, supra*, at p. 389)

In summary, any taking of property occasioned by the closure of Edgemar to vehicular access occurred in 1967 at the latest, and the statute of limitations began to run at that time. The trial court's finding to the contrary is not supported by the evidence. NP's 2001 lawsuit for inverse condemnation is thus barred by the statute of limitations, and the judgment awarding NP compensation for the taking must be reversed.

B. Nuisance.

NP's nuisance cause of action is likewise barred by the statute of limitations. (Code Civ. Proc., § 338, subd. (b).) The trial court found that the City's failure to maintain Edgemar as a public street constitutes a nuisance, which is statutorily defined to include "an obstruction to the free use of property" or anything that "unlawfully obstructs the free passage or use, in the customary manner, of any . . . public . . . street or highway. . . ."[4] (Civil Code, § 3479.)

---

[4] The record contains evidence that the closure of Edgemar was statutorily authorized by the construction of Highway 1 and the subsequent vacating of parcel 6, and thus is not an actionable nuisance. (Civil Code, § 3482; *Friends of H Street v. City of Sacramento, supra*, 20 Cal.App.4th at pp. 160-164.) The City, however, has not fully presented a statutory authorization defense to the nuisance claim on appeal, only

(Continued on following page)

Despite the closure of Edgemar to all vehicular traffic no later than 1967, the court found that NP's 2001 lawsuit was timely because Edgemar's obstruction was a "continuing nuisance" that could be abated at any time by reconstructing the road to restore access to the Fish property. The evidence does not support the finding that the closure of Edgemar is a continuing nuisance, rather than a permanent one.

Whether a nuisance is continuing or permanent depends "on the type of harm suffered." (*Baker v. Burbank-Glendale-Pasadena Airport* (1985) 39 Cal.3d 862, 868.) "[P]ermanent nuisances are of a type where '"'by one act a permanent injury is done [and] damages are assessed once for all.'"'" (*Ibid.*) Nuisances found to be permanent in nature include "solid structures, such as a building encroaching upon the plaintiff's land [citation], a steam railroad operating over plaintiff's land [citation], or regrade of a street for a rail system [citation]." (*Id.* at p. 869.) For a permanent nuisance, damages are "complete when the nuisance comes into existence," and an action must generally be brought "within three years after the permanent nuisance is erected." (*Ibid.*; but see Gov.Code, § 911.2 [government claim filing period one year].) A nuisance is not permanent, but continuing, if the nuisance "may be discontinued at any time." (*Baker, supra*, 39 Cal.3d at p. 869.) "The classic example of a continuing nuisance is an ongoing or repeated disturbance, such as . . . one . . . caused by noise, vibration or foul odor." (*Ibid.*) A person harmed by a continuing nuisance "may bring

---

remarking in its reply brief that the obstruction of Edgemar was not unlawful. Accordingly, we do not address the viability of the defense.

successive actions for damages until the nuisance is abated." (*Ibid.*)

Contrary to NP's argument on appeal, the statute of limitations applies even if the obstruction of Edgemar is characterized as a public nuisance affecting the community, as well as a private nuisance affecting NP's individual property. The statutory provision that "'[n]o lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right,'" means that "the statute of limitations is no defense to an action brought by a public entity to abate a public nuisance." (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1142.) But a private citizen's suit for special injury from a public nuisance is subject to the statute of limitations, and the only relevant consideration is whether the nuisance is permanent or continuing. (*Id.* at pp. 1142-1145; see *Phillips v. City of Pasadena* (1945) 27 Cal.2d 104, 107-108 [statute of limitations applies to obstruction of public road].)

Any nuisance created by the closure of Edgemar is plainly permanent in nature. As discussed earlier, Edgemar was "buried under close to a hundred feet of fill" during freeway construction in the 1950s, and the State placed "a steel guard rail and a fence that blocks Edgemar Road at the edge of their concrete spillway." Any alternative vehicle access provided by parcel 6 was lost in 1967, when parcel 6 was vacated by the City and returned to private ownership. NP's nuisance action, instituted in 2001, is untimely.

NP argues that the nuisance is continuing, rather than permanent, because it can be abated by the restoration of Edgemar. But the test for a continuing nuisance is

whether it can be *reasonably* abated. (*Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1100.) "'[I]t would be a rare case in which an alleged nuisance could *not* be abated were countervailing considerations (such as expense, time, and legitimate competing interests) disregarded. Thus, for example, in a strictly literal sense even a nuisance represented by an encroaching building or an underlying public utility pipeline might be discontinued or abated "at any time" by tearing down the building or digging up the pipeline.'" (*Ibid.*, italics in original) Literal abatability, however, does not transform a permanent nuisance into a continuing one. (*Ibid.*)

Abating the nuisance here would require the "complete reconstruction" of Edgemar, as NP's engineering expert admitted at trial. Edgemar would have to be regraded, repaved, and widened. An intersection between Edgemar and Palmetto would also need to be created, and that intersection would have to overcome an 18 foot vertical gap between the two roadways. While there were varying estimates of the cost of restoration, NP's expert testified at his deposition that the cost could be as high as $600,000. The obstruction of Edgemar is not reasonably abatable. The trial court's conclusion that the nuisance "could have been discontinued at any time by the City undertaking its duties of repair and maintenance" is unsupported by the evidence, which established that restoration of Edgemar as a through street would require wholesale reconstruction of a road and construction of an intersection that, if it existed at all, had been closed for decades. NP's nuisance action, brought more than 30 years after the closure of Edgemar to vehicular traffic, was untimely.

C. Mandate.

In addition to its claims for inverse condemnation and nuisance, NP petitioned for a writ of mandate to compel the City to maintain, repair, and improve Edgemar to provide access to NP's property. The trial court found that the City "breached its mandatory duty to maintain Edgemar Road." The trial court ordered the nuisance abated, and seems to have likewise intended its judgment to grant relief in mandate.

The question presented on appeal is whether the City has a duty to restore and reopen Edgemar as a through street. The City argues that NP, not the City, should bear the cost of making NP's residential development accessible to vehicular traffic. NP contends that the City is obligated to restore Edgemar, and supports its contention with *Clay v. City of Los Angeles* (1971) 21 Cal.App.3d 577 (*Clay*).) In *Clay*, a street maintained by the City of Los Angeles for over 40 years was washed out by a rainstorm. (*Id.* at p. 580.) Plaintiffs had been living in a residence abutting the street for many years before the storm, and sued the city for inverse condemnation when the city refused either to restore the street to provide plaintiffs with vehicular access, or to formally vacate the street and provide plaintiffs with compensation. (*Ibid.*) The trial court sustained a general demurrer and dismissed the complaint but the appellate court reversed the judgment of dismissal. (*Id.* at pp. 580, 588.)

The *Clay* court found that where "a city accepts a dedication and proceeds to *open, establish* and *maintain* a street, persons purchasing and constructing homes on lots abutting that street reasonably expect that the street will continue to exist in a usable condition." (*Clay, supra*, 21

Cal.App.3d at p. 584, fn. omitted, italics in original.) The court cautioned that its discussion was limited to the precise factual situation before it, and did "not purport to deal with so-called 'paper' streets where dedicated streets are described on a tract map but have not been opened or developed." (*Id.* at p. 584, fn. 1.) The court also observed that a city does not have "a never-ending duty to maintain a street that has once been established." (*Id.* at p. 586.) A city may formally vacate a street as prescribed by statute. (*Id.* at p. 587.) The court held that defendant city had two options concerning the washed out street: it could "either restore the access or compensate plaintiffs" upon formally vacating the street. (*Id.* at pp. 587-588.)

Clay does not support an order mandating that the City restore Edgemar and build an intersection connecting it with the public street system. Unlike the city in *Clay*, the City here did not open, establish, or maintain Edgemar as a through street. The trial court found that Edgemar, which had been a County road, became a City street upon the City's 1957 incorporation and assumption of jurisdiction over territory that included Edgemar. (Sts. & Hy. Code, § 989, subd. (a)(2).)[6] The court further found that, as a city street that was never formally vacated, the City had a mandatory duty to maintain and repair it. The City concedes that Edgemar is a public right-of-way under its ownership and control, but the City disputes the trial court's classification of Edgemar as a "city street." The pivotal point of controversy, however, is the trial court's

---

[6] Section 989(a)(2) provides, in relevant part, that "[a]ll right, title and interest of the county" in "any county highway included within territory heretofore incorporated as a city . . . is hereby determined to have vested in the city as a city street."

finding that Edgemar was never lawfully vacated and thus required ongoing maintenance as a through street. That finding is contrary to the evidence that the State closed Edgemar for construction of Highway 1 before the City acquired Edgemar, and the City formally vacated parcel 6, which provided the only alternative connection between Edgemar and the public street system.

NP claims that the City has never vacated "the Edgemar portion at issue herein." That argument misconstrues the extent of the Edgemar portion truly at issue in this case. While the City did not abandon "the Edgemar fragment" fronting NP's property, as the City itself concedes, the City did abandon parcel 6 which connected the Edgemar fragment to the City street system. While NP asserts that there was no evidence that parcel 6 was vacated with proper notice and a hearing, in fact there is overwhelming evidence that the City lawfully vacated parcel 6.

Alternatively, NP argues that parcel 6 is irrelevant because NP has an abutter's right of access to Edgemar and, impliedly, to access along Edgemar to Palmetto. The argument is contrary to the testimony of NP's own expert that any intersection existing between Edgemar and Palmetto near NP's property was cut off by the State's construction of Highway 1 before the City was incorporated and succeeded to any interest in Edgemar. NP counters that the City's 1999 approval of a lot line adjustment for the Fish property includes a drawing that depicts a connection between Edgemar and Palmetto. The drawing was prepared by NP's engineer and is no more than a paper representation that is equally consistent with the existence of public rights-of-way, as with improved streets. The undisputed fact, established by the testimony of NP's

own witnesses, is that no physical connection exists between Edgemar and Palmetto.

The trial court's order commanding the City to restore Edgemar and build an intersection with Palmetto thus goes far beyond *Clay's* holding that a city must maintain a street in usable condition where it "accepts a dedication and proceeds to *open, establish* and *maintain* a street" abutting homes. (*Clay, supra*, 21 Cal.App.3d at p. 584, italics in original.) The City did not open, establish, or maintain Edgemar. Edgemar was fragmented when the City acquired it, and any access to the public street system was abandoned by statutory process decades before NP bought undeveloped property abutting Edgemar. Relevant here is the *Clay* court's cautionary note that it was not imposing an obligation upon cities to open and maintain "'paper' streets where dedicated streets are described on a tract map but have not been opened or developed." (*Id.* at p. 584, fn. 1.) Edgemar was effectively rendered a "paper street" decades ago, when it was closed to through traffic by lawful procedures. There is no basis on this record for compelling the City to reconstruct Edgemar as a through street.

D. Cross-appeal: prejudgment interest.

NP contends that the trial court erred in awarding prejudgment interest on the inverse condemnation award from the date of trial rather than the date that the City refused NP's demand for restoration of Edgemar. As we are reversing the judgment awarding inverse condemnation compensation, NP is not entitled to any prejudgment interest so we need not reach this issue.

E. Appeal A107347: attorney fees and costs.

Our reversal of the judgment likewise makes it unnecessary to address the City's claim that attorney fees and costs of almost $1.2 million awarded to NP are excessive. The award of fees and costs falls with the judgment. (*Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1436-1437.)

DISPOSITION

The judgment is reversed. The postjudgment order awarding NP attorney fees and costs is reversed. The matter is remanded to the trial court with directions to enter judgment in favor of the City on all causes of action. The City shall recover its costs incurred on appeal upon timely application in the trial court. (Cal. Rules of Court, rule 27(d).)

Sepulveda, J.

We concur:

REARDON, Acting P.J.

RIVERA, J.

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

NORTH PACIFICA LLC, Plaintiff and Respondent. v. CITY OF PACIFICA, Defendant and Appellant,	A104951; A106446 (San Mateo County Super. Ct. No. CIV 419575) ORDER SEALING DOCUMENTS AND DENYING REQUEST FOR RECUSAL (Filed Jan. 06, 2005)

The transcript of the settlement conference and exhibits thereto ("the documents") have been reviewed only by the Presiding Justice of this division, who is not a member of the panel assigned to the cases. The Request for Recusal is based upon disclosure of the documents. Without regard to the merits of the Request, the members of the panel have not and will not review the documents.

On its own initiative, the court hereby orders that the clerk remove the documents attached both to the instant Request and to the appellant's Opposition to Respondent's Motion for Extension of Time to File Brief and to place said documents in a separate envelope under seal.

Respondent's request for recusal filed January 3, 2004, is hereby Denied.

BY THE COURT:

Dated: Jan. 06, 2005

KAY, P.J. P.J.

CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION FOUR

NORTH PACIFICA, LLC

v.

CITY OF PACIFICA

A104951
San Mateo County
Sup. Ct. No. 419575

(Filed Feb. 1, 2005)

BY THE COURT*:

Respondent North Pacifica's request to recuse the judicial panel in this appeal is denied.

February 1, 2005

(* Kay, P.J., Sepulveda, J. and Rivera, J. participated in the decision.)

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 4

NORTH PACIFICA LLC,

Plaintiff and Respondent.

v.

CITY OF PACIFICA,

Defendant and Appellant,

A104951
San Mateo County No. 419575

(Filed Apr. 18, 2005)

BY THE COURT:

The petition for rehearing is denied.

The request to publish this court's March 23, 2005 opinion is denied.

Date: Apr. 18, 2005

KAY, P.J. P.J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

NORTH PACIFICA LLC,
Plaintiff,

vs.

CITY OF PACIFICA,
Defendant. /

CASE NO. 419575

STATEMENT OF DECISION

(Filed Nov. 12, 2003)

This action arises from the condition of certain property owned by the Defendant City of Pacifica abutting as yet undeveloped property owned by Plaintiff North Pacifica LLC. Plaintiff commenced this action to hold Defendant responsible to the condition of the property and claiming that said condition substantially prevented Plaintiff from use of its property and thus constitutes a taking for which compensation is due. Plaintiff claims that the City had a mandatory duty to maintain the subject piece of property as a public street, and that the City's failure to properly maintain it so resulted in a nuisance. After trial and in consideration of the evidence, it is concluded that Plaintiff is entitled to judgment in its favor based upon the following findings of fact and conclusions of law.

The property in question (called Edgemar Road herein) was dedicated to public use when the 1914 subdivision map for the Edgemar Subdivision was recorded. "The act of filing for record a map of property showing lots separated by defined areas named as streets operations as an offer to dedicate the street areas to public use. *Tischauser vs. City of Newport* Beach, 225 Cal. App. 2d 138, 144 (1964). The County of San Mateo accepted the offer to

so dedicate as shown on the 1914 subdivision map for the Edgemar Subdivision. "Acceptance of dedication may be established by formal official action, or by official act of dominion over the property, such as by maintenance and repair work, or by public user, the last two elements usually coexisting." *Id.* at 145. The County expended public funds to construct and improve Edgemar Road, and Edgemar Road was driven upon and used by the public generally prior to incorporation of the City of Pacifica. Edgemar Road became a city street of the City of Pacifica when in 1957 the city was incorporated, the Edgemar Road being within the City limits. See section 989 of Streets and Highways Code and the Historical and Statutory Notes thereto.

Although Defendant claimed that it had vacated Edgemar Road, the evidence proved otherwise. Plaintiff, as the owner of property abutting Edgemar Road, a public street, have the right to expect its continued existence. Vacation or abandonment of a public street must be accomplished in the manner provided by statute since streets are in law the property of all of the people of the state. *Clay vs. city of Los* Angeles, 21 Cal. App. 3d 577, 587 (1971). It is undisputed that Edgemar Road has never been formally vacated by the city in any legal manner. Even in 1998, the City exercised dominion over it when it rejected Plaintiff's application for a summary street vacation thereof. And, in 1999, the City issued Certificates of Compliance for each of Plaintiff's seven lots abutting Edgemar Road that were recorded in the official public records of the County of San Mateo, which Certificates depict Edgemar Road as intersecting Palmetto Avenue which is undisputedly a public street and thereby providing the only access to the Plaintiff's property via the public street

system. One of the purposes of such recordation is to provide notice to the public of the matters certified by the city in the Certificates of Compliance, including, expressly, the City's certification that such lots abut and enjoy access through Edgemar Road. By issuing the Certificates indicating that the Plaintiff's lots were legal lots, the City certified, via Pacifica Municipal Code sections 9-4.218 and 9-4.253, that each had its principal frontage on a public street, road, highway, or private road approved by the City. The maps appurtenant to the Certificates show each lot abutting on Edgemar road. Plaintiff purchased the lots after the Certificates were recorded.

Plaintiff does not lack standing to bring the inverse condemnation action because at the time it acquired its interest, Edgemar Road was in its current condition. The City argues that if there was any taking, the damage occurred to some predecessor in interest to Plaintiff. Accrual of a cause of action for inverse condemnation occurs "as of the point in time when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property". *Smart vs. City of Los Angeles*, 112 Cal. App. 3d 232, 235 (1980). Here, the substantial interference with the Plaintiff's use came about when, after refusing Plaintiff's request to vacate Edgemar Road, the City, in October 2001 further refused the Plaintiff's demand that it repair and maintain Edgemar Road.

Plaintiff as the owner of property abutting Edgemar Road, a public street, has, as a matter of law, an easement of access or the right to use it for purposes of ingress and egress to the property by such modes of conveyance and travel as are appropriate, customary, or reasonable, which right may not be taken away or destroyed or substantially

impaired or interfered with without just compensation therefore. *Rose vs. State of California*, 19 Cal. 2d 713, 726-728 (1942). The City has not maintained Edgemar Road in a manner that would allow the Plaintiff, as the abutting property owner, its use for ingress and egress appropriate, customary, or reasonable for its potential uses. There is not dispute that Edgemar Road is in a state of disrepair and has not been maintained since Plaintiff purchased its property at the end of 1999. the City refused to repair and/or maintain Edgemar Road as a street for use by vehicles, as it did its other City streets. Said lack of repair and maintenance not only substantially impairs Plaintiff's right to access to its property, but it also results in a burden on Plaintiff's property that is direct, substantial and peculiar to the property itself. A public entity takes or damages private property even though it does not physically invade the property when an intangible intrusion onto the property results in a burden on the property that is direct, substantial, and peculiar to the property. *San Diego Gas and Electric Company vs. Superior Court*, 13 Cal. 4th 893, 940 (1996). Temporarily denying a landowner of all use of his property nevertheless constitutes a taking requiring compensation. *City of Needles vs. Griswold*, 6 Cal. App. 4th 1881, 1888 (1992). Thus, by failure to repair and/or maintain Edgemar Road, the City has taken or damaged Plaintiff's property, entitling it to compensation therefore.

After the interlocutory determination and decree herein that the condition of Edgemar Road constituted a taking by the City of Plaintiffs' property, the City had the opportunity to make the taking temporary by undertaking their duties of repair and maintenance. The interlocutory judgement provided the City with an opportunity to

exercise its right to elect to rescind the permanent taking by restoring Edgemar Road and paying damages for a temporary taking. Such did not occur and thus the taking by the City is a total permanent taking. Finding that the taking is permanent is not inconsistent with also ordering abatement of the public nuisance within six months after judgment in this action becomes final. The nuisance and the taking while both caused by the same lack of repair and/or maintenance by the City are two different injuries. While the City could and did elect not to rescind the permanent taking and thus transform it into a temporary one, it does not have any option in connection with the finding of a public nuisance – it must abate that, regardless of its refusal to transform the taking into a temporary one.

As damages for the permanent taking of the property, Plaintiff is entitled to the amount of the fair market value of each of the seven lots with access provided via Edgemar Road. *See, Housley vs. City of Poway*, 20 Cal. App. 4th 801, 807-810 (1993). In the bifurcated trial on the issue of damage, Plaintiff established the following fair market values, based on the direct sales comparables approach, for the seven lots via expert testimony of a qualified real estate appraiser: Lot 7A – $500,000; Lot 9A – $470,000; Lot 11A – $252,000; Lot 12A – $470,000; Lot 13A – $500,000; Lot 14A – $505,000; Lot 15A – $525,000. The total fair market value of all seven lots thus is: $3,495,000. The expert testimony proffered by the City did not establish a logical methodology for estimating the fair market value of the lots with proper access and was otherwise incredible to the Court.

The City's argument that the "parcel as a whole" doctrine should be applied is without merit. The requisites

to application of the doctrine of common ownership and use as a single unit are lacking.

Given that Edgemar Road is a city street, the City has a mandatory duty to maintain and repair it which duty can only be relieved by abandonment or vacation pursuant to statutory provisions. And, the City may be held liable for injuries caused by neglect to do repair or maintain. *Clay vs. City of Los Angeles*, 21 Cal. App. 3d 577, 582-587 (1971). The City's has been and continues to be in breach of its duty to repair and maintain Edgemar Road. And, the breach has caused the injury to Plaintiff's property of thrusting upon it a direct and substantial burden that is peculiar to the property and not a [sic] same as the burden on the public due to lack of a repaired and maintained road. Even if the City any discretion in the level of maintenance and repair, the exercise of that discretion could not reasonably include abandonment of the duties of repair and maintenance, which is the existing condition of Edgemar Road. Thus, Plaintiff is entitled to compensation for the damage caused to its property.

Impairment of an owners' right of access to and from an abutting public street constitutes both a private and a public nuisance. *Friends of H Street, vs. City of* Sacramento, 20 Cal. App. 4th 152, 160 (1993). The City's failure to maintain and/or repair Edgemar Road obstructed free passage in the customary manner of a public street and thus caused and/or maintained a nuisance. Civil Code section 3479; *Phillips v. City of Pasadena*, 27 Cal. 2d 104, 106 (1945). Plaintiff was specially injured by the nuisance due to its being an abutting property owner. *Ibid.* The nature of the nuisance is such that it could have been discontinued at any time by the City undertaking its duties of repair and maintenance. With entry of the

interlocutory decree here finding said nuisance to exist, the City was given the opportunity to abate said nuisance. The City did not take up the opportunity and the nuisance continues. The City is hereby ordered to abate said nuisance within six months of the judgment in this action becoming final.

The condition of Edgemar Road, a public street, constitutes a nuisance. Because Edgemar Road is a public street within its jurisdiction, the City has a mandatory duty to repair and maintain Edgemar Road as a public street. The city has neglected its mandatory duties to repair and maintain Edgemar Road and is hereby ordered to abate the nuisance within six months of the judgment in this action becoming final. The City further ordered to pay Plaintiff the total of $3,495,000 as compensation for the taking of Plaintiff's seven lots. Judgment is to be entered accordingly.

Dated: November 8, 2003.

/s/ Thomas McGinn Smith
THOMAS MCGINN SMITH
JUDGE OF THE SUPERIOR COURT

F1

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

NORTH PACIFICA LLC,
Plaintiff,

vs.

CITY OF PACIFICA,
Defendant. /

CASE NO. 419757

JUDGMENT

(Filed Mar. 3, 2004)

This action came regularly for trial on 15 January 2003 as to liability and on 23 June 2003 as to damages in Department 41 of the above-entitled court, before the Honorable Thomas McGinn Smith, presiding, jury having been waived. Plaintiff North Pacifica, LLC appeared through its attorneys, Jaquelynn Pope of the firm of Warshaw and Pope, and Keith M. Fromm, Attorney at Law. Defendant City of Pacifica appeared through its attorneys, Michelle Marchetta Kenyon, Thomas A. Douyan and Kevin D. Siegel of the firm of McDonough, Holland and Allen.

Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and having caused to be made and filed herein its written statement of decision,

IT IS ORDERED, ADJUDGED, AND DECREED that

1. The condition of the portion of Edgemar Road, a public street, that is adjacent to Plaintiff's property constitutes a nuisance, and Defendant shall abate said nuisance within six months of this judgment becoming final.

2. Defendant breached its mandatory duty to maintain Edgemar Road.

3. Defendant, by foregoing its opportunity to limit the taking of Plaintiff's property to a temporary one, transformed the temporary taking into a permanent one and therefore shall compensate Plaintiff for said taking by paying $3,495,000.00, plus prejudgment interest in the amount of $_____, to Plaintiff in exchange for title to the property.

4. Defendant shall further pay to Plaintiff prejudgment interest at the historical yield rate established by Moody's Corporate Bond Composite Yield index compounded at 6-month intervals from 23 June 2003.

Date: 2 March 2004.

/s/ Thomas McGinn Smith
THOMAS MCGINN SMITH
JUDGE OF THE SUPERIOR COURT

Court of Appeal, First Appellate District; Division Four –
Nos. A104951/A106446/A107347

S133559

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Jun. 15, 2005)

NORTH PACIFICA LLC, Plaintiff and Appellant,

v.

CITY OF PACIFICA, Defendant and Appellant.

Petition for review DENIED.

The request for an order directing publication of the opinion is denied.

GEORGE
Chief Justice

H1

28 USCS § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 USCS § 2101 (2005)

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title [28 USCS § 1253], holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

. . .

USCS Const. Amend. 5

Criminal actions – Provisions concerning – Due process of law and just compensation clauses

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

K1

USCS Const. Amend. 14, § 1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STREETS AND HIGHWAYS CODE
DIVISION 2. County Highways
CHAPTER 2. Powers and Duties of Boards of Supervisors

Cal Sts & Hy Code § 989 (2005)

§ 989. Vesting in city of county highway upon incorporation or annexation of territory to city; Exceptions

(a)(1) Upon the incorporation of a city or upon the annexation of territory to a city, all right, title, and interest of the county, including the underlying fee where owned by the county, in and to any county highway within the territory involved, which had been accepted into the county road system pursuant to Section 941 shall vest in the city and shall thereupon constitute a city street.

(2) All right, title, and interest of a county in and to any county highway included within territory heretofore incorporated as a city or annexed to a city is hereby determined to have vested in the city as a city street.

(b) Subdivision (a) does not apply to a road or highway which had been accepted into the county road system pursuant to Section 941 after the date of the first signature on a petition for annexation or incorporation, the adoption of a resolution of application by an affected local agency, or a date mutually agreed upon by the city and county.

(c) Nothing in subdivision (a) requires a city to improve the affected road or highway to city standards.

Cal Sts & Hy Code § 989

M1

42 USCS § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

EVIDENCE CODE
DIVISION 4. Judicial Notice

Cal Evid Code § 459 (2005)

§ 459. Judicial notice by reviewing court

(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

(b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454.

(c) When taking judicial notice under this section of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party

reasonable opportunity to meet such information before judicial notice of the matter may be taken.

Cal Evid Code § 459

CALIFORNIA RULES OF COURT

TITLE THREE. Miscellaneous Rules

DIVISION III. Rules for Publication of Appellate Opinions

Cal Rules of Court R 976 (2005)

Rule 976. Publication of appellate opinions

(a). Supreme Court

All opinions of the Supreme Court are published in the Official Reports.

(b). Courts of Appeal and appellate divisions

Except as provided in (d), an opinion of a Court of Appeal or a superior court appellate division is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court.

(c). Standards for certification

No opinion of a Court of Appeal or a superior court appellate division may be certified for publication in the Official Reports unless the opinion:

(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) resolves or creates an apparent conflict in the law;

(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial, history of a provision of a constitution, statute, or other written law.

(d). Changes in publication status

(1) Unless otherwise ordered under (2), an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.

(2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review.

(e). Editing

(1) Computer versions of all opinions of the Supreme Court and Courts of Appeal must be provided to the Reporter of Decisions on the day of filing. Opinions of superior court appellate divisions certified for publication must be provided as prescribed in rule 106.

(2) The Reporter of Decisions must edit opinions for publication as directed by the Supreme Court. The Reporter of Decisions must submit edited opinions to the courts for examination, correction, and approval before finalization for the Official Reports.

Cal Rules of Court R 976

Rule 977. Citation of opinions

(a). Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b). Exceptions

An unpublished opinion may be cited or relied on:

(1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or

(2) when the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c). Citation procedure

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d). When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

Cal Rules of Court R 977

2

No. 05-604

In The
Supreme Court of the United States

NORTH PACIFICA LLC,

Petitioner,

v.

CITY OF PACIFICA,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION

MICHELLE MARCHETTA KENYON
Counsel of Record
MEGAN H. ACEVEDO
VERONICA RAMIREZ
MCDONOUGH HOLLAND
& ALLEN PC
Attorneys at Law
1901 Harrison, 9th Floor
Oakland, California 94612
Tel: 510.273.8780
Fax: 510.839.9104

Attorneys for Respondent
City of Pacifica

CECILIA QUICK
City of Pacifica
170 Santa Maria Avenue
Pacifica, California 94044
Tel: 650.738.7308
Fax: 650.359.8947

City Attorney for
City of Pacifica

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENYING REVIEW	6
A. The Questions Presented by NP Regarding Disqualification Procedures for Appellate Panels and Nonpublication of the Court of Appeal's Decision Do Not Warrant Review by this Court	6
1. Neither the Decision Below Nor the Record Raises the Questions Presented by NP Regarding Disqualification Procedures for Appellate Panels or Nonpublication of the Court of Appeal's Decision	7
2. Even if Properly Raised, NP's Due Process and Equal Protection Rights Were Not Violated by the Appellate Court's Issuance of an Unpublished Opinion	8
3. Even if Properly Raised, NP's Due Process and Equal Protection Rights Were Not Violated by the State's Procedural Rules Regarding Recusal of Appellate Judges	12
B. The Decision of the California Court of Appeal Was Correct	14
1. The Appellate Court Properly Rejected NP's Inverse Condemnation Claim as Being Time Barred	14
2. The Appellate Court Properly Rejected NP's Nuisance Claim	18

TABLE OF CONTENTS – Continued

Page

C. NP Has No Constitutional Right to Litigate Its Takings Claim in Federal Court 20

D. The Issues Presented by NP Do Not Warrant Review under Rule 10 of the Supreme Court Rules 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allen v. McCurry, 449 U.S. 90 (1980)..... 20, 21, 22

Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001).... 8, 10, 11

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982)..... 21

Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75 (1984)..... 21

San Remo Hotel, L.P., 125 S.Ct. 2491 (2005)..... 20, 21

Stone v. Powell, 428 U.S. 465 (1976)..... 22

STATE CASES

Aaron v. City of Los Angeles, 40 Cal.App.3d 471 (1974)..... 16

Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450 (Cal. 1962)..... 10

Baker v. Burbank-Glendale-Pasadena Airport, 39 Cal.3d 862 (1985)..... 19

CAMSI IV v. Hunter Technology Corp., 230 Cal.App.3d 1525 (1991)..... 16

Capogeannis v. Superior Court, 12 Cal.App.4th 668 (1993)..... 19

Estate of Schaeffer, 53 Cal.App. 493 (1921)..... 14

First Western Dev. Corp. v. Superior Court, 212 Cal.App.3d 860 (1989)..... 7, 12, 13

Kaufman v. Court of Appeal, 31 Cal.3d 933 (1982)..... 7, 12

TABLE OF AUTHORITIES – Continued

Page

Mangini v. Aerojet-General Corp., 12 Cal.4th 1087 (1996) 19

Mehl v. People ex rel. Dept. Public Works, 13 Cal.3d 710 (1975) 16

Monesian v. County of Fresno, 28 Cal.App.3d 493 (1972) 16, 18

Pacific Gas & Electric Co. v. Hacienda Mobile Home Park, 45 Cal.App.3d 519 (1975) 18

People v. Rios, 23 Cal.4th 450 (2000) 15

Sanchez v. South Hoover Hospital, 18 Cal.3d 93 (1976) 14

Schmier v. Supreme Court of California, 78 Cal.App.4th 703 (2000) 8, 10, 11

Shamsian v. Atlantic Richfield Co., 107 Cal.App.4th 967 (2003) 19

Snukal v. Flightways Mfg., Inc., 23 Cal.4th 754 (2000) 15

Zaremberg v. Superior Court, 115 Cal.App.4th 111 (2004) 13

CONSTITUTIONAL PROVISIONS

Cal. Const., art. VI, § 6 8

Cal. Const., art. VI, § 14 8

FEDERAL STATUTES

28 U.S.C. § 455 12

28 U.S.C. § 1738 21

TABLE OF AUTHORITIES – Continued

Page

STATE RULES

Cal. Rules of Court, Rule 28 15

Cal. Rules of Court, Rule 976 9

Cal. Rules of Court, Rule 978 9

STATE STATUTES

Cal. Code Civ. Proc., § 170.5 12

Cal. Gov't Code, § 68902 8

FEDERAL RULES

S. Ct. R. 10 ..... 18, 22

S. Ct. R. 14 7

OTHER AUTHORITIES

2 Nichols' The Law of Eminent Domain § 5.01(5)(d) (Julius L. Sackman, Patrick J. Rohan, eds., rev. 3d ed. 2005) 18

Cal.C.Jud.Ethics, Canon 3E 13

Robert L. Stern et al., Supreme Court Practice 459-460 (8th ed. 2002) 8

STATEMENT OF THE CASE

North Pacifica, LLC (NP) has taken a simple case about a public right of way and has twisted it into a confusing tangle of misstatements in an attempt to gain the attention of the U.S. Supreme Court. NP mischaracterizes the facts underlying the case and misleads the Court by suggesting that procedural impediments prevented NP from having its day in court. NP's claims are without merit.

This case is a dispute about improving a public right of way that provides access to seven undeveloped lots owned by NP and located in the City of Pacifica. Although NP argues that the Appellate Court considered improper evidence in its review of the case, in fact, the court relied only on undisputed facts to reach its decision. Nothing set forth in NP's Petition for Writ of Certiorari (Petition) demonstrates otherwise. The following uncontroverted facts form the foundation for the Court of Appeal conclusion that the trial court decision should be reversed.

NP is a real estate developer that purchased undeveloped land abutting Edgemar Road (Edgemar) in the City of Pacifica (City) for approximately $350,000.00 in 1999. Edgemar is a fragment of roadway no longer than 750 to 1,000 feet long. The property resembles the figure of a fish and has been commonly referred to as the "Fish" property. There are no houses or improvements of any kind along Edgemar. And as NP noted in its briefing in the Court of Appeal, Edgemar has "degraded pavement, vegetation up to eight feet high growing through its center," and piles of dirt obstructing passage. (Petition, Appendix (Pet. App.) A at p. A2, A6.)

Sometime in the 1950's, the State of California (State) constructed Highway 1 and, in connection with that highway construction, physically closed Edgemar. This fact was confirmed by NP's civil engineering expert, Louis Arata who agreed that "Edgemar was 'cut off' by Highway 1 sometime before November 1957, when the City was incorporated."[1] (Pet. App. A at p. A4.) Edgemar was reduced to isolated fragments of physically abandoned roadway without connection to any public street system. (Pet. App. A at p. A3.)

Accordingly, the Fish property has not had any vehicular access since 1967 at the latest, more than 30 years before NP bought the property. NP's principal admitted at trial that he visited the property before NP purchased it, and knew that vehicles were not making use of the neglected right of way.[2] (Pet. App. A at p. A3.) The facts are

---

[1] NP's assertion in its statement of the case that Edgemar is "a dedicated and accepted public, city street" that was never lawfully vacated is misleading. (Pet. at p. 5.) The Appellate Court found this claim to be contrary to the evidence that the State closed Edgemar for construction of Highway 1 before the City acquired Edgemar, and the City formally vacated parcel 6, which provided the only alternative connection between Edgemar and the public street system. (Pet. App. A. at p. A18.) The Appellate Court found that NP's "argument misconstrued the extent of the Edgemar portion truly at issue in this case. While the City did not abandon 'the Edgemar fragment' fronting NP's property, . . . the City did abandon parcel 6 which connected the Edgemar fragment to the City street system." (Pet. App. A at p. A18.) As the Appellate Court found, "Edgemar was effectively rendered a 'paper street' decades ago, when it was closed to through traffic by lawful procedures." (Pet. App. A at p. A19.)

[2] NP repeatedly states that it received Certificates of Compliance from the City, all of which include a drawn map that depicts Edgemar Road as the sole access to each of the Fish lots and indicates that Edgemar and Palmetto avenues overlap. (Pet. at p. 8.) These representations misconstrue the facts. The Appellate Court explained that "[t]he drawing was prepared by NP's engineer and is no more than a paper representation that is equally consistent with the existence of public

(Continued on following page)

also clear that Edgemar has not been maintained for at least 50 years. Edgemar is without sidewalks and street lights. The road would have to be regraded, repaved, and widened in order to provide street access. Palmetto Avenue is the closest improved roadway to Edgemar and to NP's property. However, in order to connect Edgemar to Palmetto, a new intersection between Edgemar and Palmetto would need to be created, and that intersection would have to overcome an 18 foot vertical gap between the two roadways.[3] (Pet. App. A at p. A6.)

NP also holds development rights in unimproved property on the other side of Edgemar, across from the Fish lots, called the Bowl property. NP intends to build 43 residential units on the Bowl property's 4.2 acres, and its vesting tentative map for the project requires NP to develop Edgemar as an access road to that subdivision.[4]

---

right-of-way, as with improved streets. The undisputed fact, established by the testimony of NP's own witnesses, is that no physical connection exists between Edgemar and Palmetto." (Pet. App. A at p. A19.) Thus, NP's assertion that the certificates have any bearing on NP's alleged right to have the City construct an intersection between these two streets is wrong.

[3] NP arguably concedes this point in its Petition when it states "The Fish is separated from the elevation by Palmetto Avenue, which is a main thoroughfare in northern Pacifica." (Pet. at p. 7.)

[4] NP makes the accusation that the City prevented NP from gaining access to its property when it refused to vacate Edgemar. NP suggests that "[t]he City denied NP's application for summary vacation of Edgemar and it has also refused to repair Edgemar, thus leaving the Fish lots effectively landlocked and depriving NP of all use and value of its property." (Pet. at p. 5.) NP's characterization of the facts is inaccurate. NP sought vacation to create three new lots, not to build an access road. (Pet. at p. 8.) Moreover, the evidence is uncontradicted that there has been no vehicle access between Edgemar and the public street system since 1967, at the latest. NP inspected the property before purchasing it, and saw that Edgemar provided no vehicle access. NP concedes on appeal that Edgemar's physical condition is "substantially

(Continued on following page)

(Pet. App. A at p. A3, n. 1.) As part of the Bowl property, NP controls the private parcel (parcel 6) that provided vehicular access to Edgemar when such access last existed in 1967. (Pet. App. A at p. A6, n. 2.) "Any alternative vehicle access provided by parcel 6 was lost in 1967, when parcel 6 was vacated by the City and returned to private ownership." (Pet. App. A at p. A10.) The Edgemar fragment and abandonment of parcel 6 remained unchanged for thirty-four years up to and including November 2001. In 2001, NP filed a claim demanding that the City "repair and maintain" Edgemar so as to provide access directly from the Edgemar fragment to Palmetto Avenue. That demand was refused by the City and later turned into litigation when NP filed the present suit.

NP filed suit in San Mateo County Superior Court, claiming that the City had inversely condemned the Fish lots by refusing to "repair and maintain" Edgemar Road. NP also alleged that the condition of Edgemar constituted a nuisance and it sought to have the City construct Edgemar by seeking a writ of mandamus. In the liability phase of the trial, Judge Smith found that the City was liable for inverse condemnation, nuisance and mandate for failing to connect Edgemar to the City's public street system. In the damages phase, Judge Smith awarded $3,495,000, which he determined was the entire value of respondent's undeveloped property valued as if it had access. This is ten times the $350,000.00 that NP paid for the property four years earlier. (Pet. App. A at p. A2.) In addition to awarding damages, the court ordered the City to "repair and maintain" a street intersection between Edgemar Road and Palmetto Avenue

---

impaired" and has been for decades." (Pet. App. A at p. A9.) Thus, contrary to NP's assertion, the City's denial of NP's vacation request did not leave the Fish lots inaccessible, as they had been landlocked for decades.

that does not exist. (Pet. App. A at p. A19.) The court further awarded attorneys' fees and costs of almost $1.2 million to NP. (Pet App. A at p. A20.)

The City filed an appeal from the trial court's decision on March 13, 2004. NP also filed a cross-appeal and a series of motions in the Court of Appeal. Two of these motions included requests for recusal of the appellate panel. NP's first recusal request was based on the grounds that the appellate panel had been prejudiced when the City filed with the Appellate Court a transcript of a settlement offer made in open court. (Pet. App. B.) The justices denied NP's request with a written order explaining that only the Presiding Justice, who was not a member of the panel for the case, had reviewed the settlement offer. (Pet. App. B.) In addition, without regard to the merits of the recusal request, the Appellate Court had put the documents under seal to prevent the panel from reviewing them. (Pet. App. B.)

Shortly thereafter, NP submitted its second request for recusal in a letter brief to each of the justices on the panel. (Request for Recusal of January 25, 2005 (Brief in Opposition, Appendix [Opp. App.] 13.).) The letter suggested that the panel should recuse itself because it had denied NP's appeal in a case involving the California Coastal Commission approximately one month earlier. (Opp. App. 13.) The panel denied NP's second request without comment on February 8, 2005. (Pet. App. C.)

On March 23, 2005 the court filed its decision reversing the trial court on the judgment and on the postjudgment order awarding NP its litigation costs. The Appellate Court remanded to the trial court "with the directions to enter judgment in favor of the City on all causes of action." (Pet. App. A at p. A20.) After the opinion was issued, the

Court of Appeal denied NP's Petition for Rehearing and its Request for Publication. (Pet. App. D.) NP filed both a Petition for Writ of Certiorari, and a Petition for Review in the California Supreme Court. The State Supreme Court denied both of NP's petitions along with the Request for Publication on June 15, 2005. (Pet. App. G; Opp. App. 20.)

On November 8, 2005 NP filed its Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING REVIEW

A. The Questions Presented by NP Regarding Disqualification Procedures for Appellate Panels and Nonpublication of the Court of Appeal's Decision Do Not Warrant Review by this Court.

The majority of the Questions Presented by NP in its Petition center around its claims that its due process and equal protection rights under the Fourteenth Amendment to the United States Constitution were violated due to 1) a lack of state procedures for disqualification of an appellate panel, and 2) the Court of Appeal's reversal of the trial court's decision by means of an unpublished decision. (Pet. at p. i.) This case presents a poor vehicle for resolving these issues, both because such issues were not raised below and also because neither the unpublished decision nor state procedures regarding disqualification of appellate panels raise any substantive federal question.

1. Neither the Decision Below Nor the Record Raises the Questions Presented by NP Regarding Disqualification Procedures for Appellate Panels or Nonpublication of the Court of Appeal's Decision.

Supreme Court Rule 14 provides that a petition for review of a state-court judgment must contain: (1) specification of the stage in the proceedings, both in the court of first instance and in the appellate courts; (2) when the federal questions sought to be reviewed were raised; (3) the method or manner of raising them and the way in which they were passed on by those courts; and (4) pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears. *See* S. Ct. R. 14(g)(i). This Court placed these requirements "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." *Id.*

NP does not, nor can it, provide this Court with the above information because the constitutional questions raised by NP are new to this case. They were never raised or decided by the courts below. Neither the rules on publication nor the procedure for recusal of an appellate panel were briefed for the trial court or the Court of Appeal, the last court to review this case. Additionally, as to recusal, NP never petititioned the California Supreme Court for review on the ground that the appellate proceeding was illegally and prejudicially unfair. *See Kaufman v. Court of Appeal*, 31 Cal.3d 933, 939 (1982); *First Western Dev. Corp. v. Superior Court*, 212 Cal.App.3d 860, 867 (1989). When a petition raises questions which were not decided by the court below because they were not raised, any such defect is ordinarily

fatal to the petition. Robert L. Stern et al., Supreme Court Practice 459-460 (8th ed. 2002). More importantly, the proper medium for putting forward such a claim is to bring suit against the California courts. *See, e.g., Schmier v. Supreme Court of California*, 78 Cal.App.4th 703 (2000). No California court has been afforded an opportunity to review NP's challenge. As a result, this is not an appropriate case for resolving the constitutional questions raised by NP as to California court practices.

2. Even if Properly Raised, NP's Due Process and Equal Protection Rights Were Not Violated by the Appellate Court's Issuance of an Unpublished Opinion.

NP rests the bulk of its argument on the assertion that it was deprived of its right to due process because the Appellate Court did not publish its decision. Nonpublication of a decision does not violate any constitutional or statutory law. *Schmier*, 78 Cal.App.4th at 708-711; *Hart v. Massanari*, 266 F.3d 1155, 1163, 1180 (9th Cir. 2001). California's Constitution and its Legislature clearly disclose an intent that this state not require publication of every opinion of the intermediate appellate courts. Cal. Const., art. VI, § 14; Cal. Gov't Code § 68902 (Opp. App. 3.). Furthermore, the United States Constitution does not contain an express prohibition against issuing unpublished opinions. *Hart*, 266 F.3d at 1163 ("The Constitution does not contain an express prohibition against issuing nonprecedential opinions because the Framers would have seen nothing wrong with the practice.").

The Judicial Council of California is constitutionally empowered to adopt rules for court administration, practice and procedure, providing they are not inconsistent with statute. Cal. Const., art. VI, § 6 (Opp. App. 2.); *Schmier*,

78 Cal.App.4th at 708. Accordingly, the Judicial Council has adopted rules which provide publication of opinions of the courts of appeal only on a selective basis, leaving the final decision on whether to publish to the state's highest court, the Supreme Court of California. Cal. Rules of Ct., Rule 976(b) & (c) (Pet. App. O at p. O1-O2).[5] The appellate opinion in the present case did not satisfy the publication criteria and, therefore, was appropriately left unpublished.

If an appellate court issues an unpublished opinion, any person may request that the opinion be certified for publication. Cal. Rules of Ct., Rule 978 (Opp. App. 1.). Rule 978 sets forth the procedures to be followed by the reviewing courts. If the rendering appellate court does not honor a request to publish, Rule 978 obligates the Supreme Court to rule on the request. Cal. Rules of Ct., Rule 978 (Opp. App. 1.). In this case, the Court of Appeal did not certify its opinion because it did not warrant publication. (Pet. App. A at p. A1.) NP requested certification of the opinion for publication. In accordance with Rule 978, upon denying the request, the Appellate Court forwarded the opinion to the Supreme Court who likewise denied the request. (Pet. App. D & G.) Therefore,

---

[5] Pursuant to Rule 976 of the California Rules of Court, an opinion by a court of appeal cannot be published unless it meets one or more of the following requirements:

(1) it establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;

(2) it resolves or creates an apparent conflict in the law;

(3) it involves a legal issue of continuing public interest; or

(4) it makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

California's highest court, not the Court of Appeal, determined that the subject opinion failed to meet the standards for publication set forth in the California Rules of Court.

NP has failed to provide any reason why this Court should reverse the California court's consistent practice relating to publication of opinions. Contrary to NP's assertion, California's rules of publication do not contravene the doctrine of *stare decisis*, which obligates inferior courts to follow the decisions of courts exercising superior jurisdiction. *Schmier*, 78 Cal.App.4th at 710; *see also Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (Cal. 1962). The Court of Appeal is bound by the doctrine of *stare decisis* whether its decision is published or unpublished. *Ibid.*; *Auto Equity Sales, Inc.*, 57 Cal.2d at 455. As the court in *Schmier* succinctly stated, "the rules assure that all citizens have access to legal precedent, while recognizing the litigation fact of life expressed in *Beam* that most opinions do not change the law." *Schmier*, 78 Cal.App.4th at 711.

The majority of court of appeal opinions are not published for the simple reason that they are routine and will not have significance for anyone other than the litigants in those cases. *Id.* at 712; *Hart*, 266 F.3d at 1177-1178. "Our typical opinions in such cases add nothing to the body of *stare decisis*, and if published would merely clutter overcrowded library shelves and databases with information utterly useless to anyone other than the actual litigants therein and complicate the search for meaningful precedent." *Ibid.*

NP asserts that it "had no defense against the Appellate Court's unpublished decision" and that the Appellate Court chose to "abrogate [NP's] right by means of an unpublished opinion." (Pet. at p. 24.) However, nonpublication does not

equate with inadequate review. "Sufficient restrictions on judicial decision making exist to allay fears of irresponsible and unaccountable practices such as 'burying' inconvenient decisions through nonpublication." *Hart*, 266 F.3d at 1178, n. 35. The Appellate Court is still bound by the doctrine of *stare decisis*.

NP is also mistaken in its assertion that had the decision been published, it would have provided public notice to the world. (Pet. at p. 25.) Nonpublication of an opinion affects the precedential value of a case, it does not limit public access. California's Supreme Court addressed this in *Schmier*:

> Finally, in closing, we address appellant's erroneous notion that nonpublication equates with secrecy. It hardly needs mentioning that opinions, rulings and orders of the Court of Appeal are public records, open to all. Indeed, the nonpublished opinions are not only available to the public, but frequently become the subject of media broadcasts and publications. The fact that opinions are not published in the Official Reports means nothing more than that they cannot be cited as precedent by other litigants who are not parties thereto. But they are certainly available to any interested party.

Schmier, 78 Cal.App.4th at 712.

In sum, the Court of Appeal and California Supreme Court's decisions not to publish this opinion did not affect NP's right to due process or equal protection.

3. Even if Properly Raised, NP's Due Process and Equal Protection Rights Were Not Violated by the State's Procedural Rules Regarding Recusal of Appellate Judges.

NP contends that California provides no procedure to disqualify an appellate judge. However, this statement is blatantly false. The State of California has set specific standards for disqualifying Court of Appeal judges. Although the statutory procedures for disqualifying a trial judge do not apply to appellate judges, appellate judges must follow the standards set out in Canon 3E. *See* Cal. Code Civ. Proc. § 170.5(a). Moreover, California follows the federal rule prescribing that each appellate justice must decide whether he or she should withdraw from an appeal because of an inability to be impartial. 28 U.S.C. § 455; *Kaufman*, 31 Cal.3d at 938-39; *First Western Dev. Corp.*, 212 Cal.App.3d at 867.

Canon 3E of the California Code of Judicial Ethics sets forth general and specific grounds for which an appellate justice "shall" disqualify himself or herself. The Canon's provisions concerning disqualification of an appellate justice are intended to assist justices in determining whether recusal is appropriate and to inform the public why recusal may occur. Cal.C.Jud.Ethics, Canon 3E, Commentary. Pursuant to Canon 3E, the general standards for an appellate justice's disqualification are:

> An appellate justice shall disqualify himself or herself in any proceeding if for any reason:
>
> (a) the justice believes his or her recusal would further the interest of justice; or
>
> (b) the justice substantially doubts his or her capacity to be impartial; or

> (c) the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.

Cal.C.Jud.Ethics, Canon 3E(4) (Opp. App. 9.); *see also Zaremberg v. Superior Court*, 115 Cal.App.4th 111, 114, n. 4 (2004).[6]

In fact, NP followed these rules in the state courts below. NP first requested recusal of the appellate panel after the City submitted transcripts of a settlement offer made in open court to the Appellate Court. (Pet. App. B.) The Appellate Court ordered the documents removed from the record and sealed after the Presiding Justice for the First Appellate District's Division Four, who was not assigned to the case, reviewed them. NP's first request was therefore denied because the panel did not review the documents and could not have been prejudiced. (Pet. App. B.) NP later submitted a second recusal request on the basis that the panel had issued a ruling adverse to NP prior to this appeal. (Opp. App. 13.) Again, NP's request was correctly denied. (Pet. App. C.) A prior adverse ruling against a litigant does not warrant recusal. *First Western Dev. Corp.*, 212 Cal.App.3d at 867. Thus, an adequate procedure is available in state court for recusal of appellate justices and NP utilized the process.

---

[6] Disqualification is also required in specific instances as set forth in Canon 3E(5), none of which apply in this situation. Cal.C.Jud.Ethics, Canon 3E(5)-(h) (Opp. App. 9-12.).

B. The Decision of the California Court of Appeal Was Correct.

1. The Appellate Court Properly Rejected NP's Inverse Condemnation Claim as Being Time Barred.

In its Petition, NP asserts that "[t]he Appellate Opinion, while it conceded there was a governmental taking of NP's private property, defied binding California and U.S. Supreme Court precedent in order to effect a politically popular but legally unsound, unfair and discriminatory result towards NP." (Pet. at p. 2.) NP flagrantly misrepresents the Appellate Court's ruling. The court never determined that a taking occurred because it found that the statute of limitations barred recovery for such a claim.[7] The Appellate Court's opinion specifically states: "*We need not address whether a claim of failure to maintain an unusable fragment of a public road can constitute inverse condemnation* because it is equally well settled that statutes of limitations apply to inverse condemnation actions for damage to property (three years) or a physical taking of property (five years)." (Pet. App. A at p. A8 (emphasis added).) Thus, the court never reached an opinion as to whether a taking had occurred because NP's claim was time barred.

The Appellate Court's statute of limitations analysis was accurate and in accordance with the applicable law.

---

[7] Where, as here, an action is time barred, the right to bring suit on a claim that could have been maintained has expired. The statute of limitations affects a party's remedy. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate. *Estate of Schaeffer*, 53 Cal.App. 493, 495 (1921). The limitation period's application effectively results in a summary judgment preventing assertion of any claim, whether meritorious or not. *Sanchez v. South Hoover Hospital*, 18 Cal.3d 93, 103 (1976).

Nowhere in NP's Petition does it directly challenge the legal standard for statute of limitations that was applied by the Appellate Court. NP does not attempt to cast doubt on the Court of Appeal's reliance on California Code of Civil Procedure section 338 (inverse statute of limitation) or case law that clearly establishes that NP's claim was brought decades after the statute of limitations began to run. Thus, NP has failed to petition this Court to review the primary basis for the Court of Appeal's inverse decision, i.e., that the trial court incorrectly found that a remedy for inverse condemnation could be sought when the statute of limitations had run many times over.[8]

The appellate opinion provides that none of the facts in the record supported the trial court's finding that NP could be awarded damages for its inverse claim. As the Appellate Court correctly noted, if a taking had ever occurred, it took place decades before NP purchased the Fish property. The court reasoned, "[a] cause of action for inverse condemnation accrues 'when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property' (*Smart v. City of Los Angeles* (1980) 112 Cal.App.3d 232, 235) and the damage is 'sufficiently

---

[8] NP's Petitions for Writ of Certiorari and for Review by the California Supreme Court were similarly flawed in that they lacked any reference to the statute of limitations finding. As the City explained in its responsive pleadings to NP's petitions to the state Supreme Court, the failure to raise an issue in a petition prevents review of the issue. Specifically, under Rule 28(e)(2) of the California Rules of Court, only issues set forth in the petition and the answer, or fairly included in them, need be considered by this Court. The Court has broad discretion to deny review of issues not properly raised in a petition for review. *People v. Rios*, 23 Cal.4th 450 (2000); *Snukal v. Flightways Mfg., Inc.*, 23 Cal.4th 754, 772-73 (2000). The California Supreme Court subsequently denied NP's Petitions for Review and Writ of Certiorari. (Opp. App. 20.)

appreciable to a reasonable man.' (*Mehl v. People ex rel. Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 717.)" (Pet. App. A at p. A8.) Further support for the court's holding can be found in numerous cases. *See, e.g., Monesian v. County of Fresno*, 28 Cal.App.3d 493, 500 (1972); *Aaron v. City of Los Angeles*, 40 Cal.App.3d 471, 491-492 (1974); *CAMSI IV v. Hunter Technology Corp.*, 230 Cal.App.3d 1525, 1534-35 (1991).

The court also examined the various undisputed facts in the record that demonstrate the decades of obvious and substantial interference with the property's use and enjoyment that preceded NP's acquisition of the Fish lots. (Pet. App. A at p. A9.) Based on these material facts, it concluded by stating:

> any taking of property occasioned by the closure of Edgemar to vehicular access occurred in 1967 at the latest, and the statute of limitations began to run at that time. The trial court's finding to the contrary is not supported by the evidence. NP's 2001 lawsuit for inverse condemnation is thus barred by the statute of limitations, and the judgment awarding NP compensation for the taking must be reversed.

(Pet. App. A at p. A12.)

NP attempts to argue that the Appellate Court erroneously ignored the trial court's factual findings and relied on evidence outside of the record to conclude that no taking had occurred. However, the piece of evidence that NP suggests was improper was a freeway agreement from 1954, which the Appellate Court confirmed was not before the trial court. (Pet. at pp.19-20.) The Appellate Court did not rely on the freeway agreement, as is clear from the court's decision. Rather, the court makes note of the agreement without further comment and goes on to trace

the evidence that was in front of the trial court related to the legal status of Edgemar. (Pet. App. A at pp. A4-A5.)

The Appellate Court's decision describes how the road was physically cut off from the street system by construction of Highway 1 in 1957. The court quoted the trial testimony establishing the time at which access to Edgemar ceased:

> [City Engineer] Holmes testified that the highway construction included the closure of Edgemar in late 1956, when it was 'buried under close to a hundred feet of fill.' Holmes explained that Edgemar was further obstructed by the State's placement of a 'steel guard rail and a fence that blocks Edgemar Road at the edge of their concrete spillway.' NP's civil engineering expert, Louis Arata, agreed that Edgemar was 'cut off' by Highway 1 sometime before November 1957, when the City incorporated.

(Pet. App. A at p. A4.)

The court also explained that the alternative access to the public street system from Edgemar, parcel 6, was vacated in 1967. (Pet. App. A at pp. A4, A9.) The Appellate Court drew these facts from the trial court record and concluded, "[t]he evidence is uncontradicted that there has been no vehicle access between Edgemar and the public street system since 1967, at the latest." (Pet. App. A at p. A9.) Thus, the freeway agreement did not factor into the court's holding that the inverse condemnation statute of limitations began to run in 1967 at the latest and therefore, that it had run decades before NP brought its claim.

Moreover, the actual issues raised by this Petitioner merely dispute factual determinations of the court below. The Supreme Court Rules disfavor review of asserted erroneous factual findings or the misapplication of a properly

settled rule of law. S. Ct. R. 10. "Petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*; *see also* Stern, *supra*, at 459-460. NP concedes that the decision below turns upon its own facts, and that it will affect few others besides the litigants. (*See* Pet. at p. 25.) Additionally, NP suggests that the Appellate Court misapplied the law related to triggering the statute of limitations for its inverse condemnation and nuisance claims. (Pet. at p. 6, *citing Mehl v. People ex rel. Dept. Public Works*, 13 Cal.3d 710, 717 (1975).) NP is mistaken on all these assertions. However, regardless of whether NP's claims of factual errors and misapplication of the law are valid, they certainly do not justify this Court's review.

In the instant case, the Court of Appeal found that the challenged action occurred in 1967 at the latest. Therefore, "[a]ny action for inverse condemnation thus accrued decades ago, and in favor of the previous owner of the subject property."[9] (Pet. App. A at p. A10.) NP is barred from asserting a takings claim; thus, as a matter of law, NP has not and cannot prove a takings claim.

2. The Appellate Court Properly Rejected NP's Nuisance Claim.

The Court of Appeal also correctly found NP's nuisance claim to be time barred. The only contention in NP's

---

[9] Because NP was not the property owner at the time the alleged taking accrued, it cannot state a claim for a taking. If the property allegedly taken is not owned by the plaintiff, there can be no claim for compensation. *See Pacific Gas & Electric Co. v. Hacienda Mobile Home Park*, 45 Cal.App.3d 519, 529-530 (1975); 2 Nichols' The Law of Eminent Domain § 5.01(5)(d) (Julius L. Sackman, Patrick J. Rohan, eds., rev. 3d ed. 2005). A subsequent owner has no "rights" that can be "taken"; therefore no compensation is due. *Id.*

present petition with regard to nuisance is that the Appellate Court considered improper evidence related to the cost of restoring Edgemar and connecting it to the public street system. (Pet. at p. 23.) NP again ignores the material facts relied upon by the court in an effort to discredit a valid judicial decision. The Appellate Court described the error at the trial court level as follows:

> Despite the closure of Edgemar to all vehicular traffic no later than 1967, the court found that NP's 2001 lawsuit was timely because Edgemar's obstruction was a 'continuing nuisance' that could be abated at any time by reconstructing the road to restore access to the Fish property. The evidence does not support the finding that the closure of Edgemar is a continuing nuisance, rather than a permanent one.

(Pet. App. A at p. A13.)

The opinion continues by reiterating black letter law that a permanent nuisance is one that, "'by one act a permanent injury is done [and] damages are assessed once for all.'" (Pet. App. A at p. A13 [Citing *Baker v. Burbank-Glendale-Pasadena Airport*, 39 Cal.3d 862, 868 (1985)].)[10] The Appellate Court in turn, found that any potential nuisance in the instant case, "is plainly permanent in nature" and barred by the statute of limitations when any potential offending action took place at the latest in 1967. (Pet. App. A at p. A14.)

---

[10] It is well established that if a nuisance is permanent, the plaintiff must bring one action for past, present and future damage within three years after creation of the permanent nuisance. *Shamsian v. Atlantic Richfield Co.*, 107 Cal.App.4th 967 (2003); *see also Mangini v. Aerojet-General Corp.*, 12 Cal.4th 1087 (1996); *Capogeannis v. Superior Court*, 12 Cal.App.4th 668 (1993).

NP suggests that the Appellate Court based its conclusion about abatability on its mention of deposition testimony by NP's expert.[11] (Pet. at p. 23.) However, NP takes no issue, nor can it, with the court finding based on trial evidence that, "[a]bating the nuisance here would require the 'complete reconstruction' of Edgemar, as NP's engineering expert admitted at trial. Edgemar would have to be regraded, repaved, and widened. An intersection between Edgemar and Palmetto would have to overcome an 18 foot vertical gap between the two roadways." (Pet. App. A at p. A15.) These undisputed facts constituted the foundation on which the Appellate Court reached its decision. As such, the Court correctly found that any alleged nuisance was not abatable, making it permanent and time barred. Therefore, this Court should deny NP's request for review of this issue.

C. NP Has No Constitutional Right to Litigate Its Takings Claim in Federal Court.

NP argues that its constitutional rights have been violated by its inability to bring its takings claim in federal court. This claim has no basis in law. It is well settled that there is no constitutional right to vindicate federal takings claims in federal court. *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980); *San Remo Hotel, L.P.*, 125 S.Ct. 2491, 2502 (2005). The Supreme Court has held that

[11] NP attempts to make a mountain out of a molehill from the court's reference to deposition testimony in the opinion. (Pet. at p. 23; Pet. App. A at p. A15.) The court's reference to "deposition" is a typographical error. Instead, that testimony came from Mr. Fromm, the author of the instant Petition for Review, at *trial*, where he stated that it was his recollection that his own expert told Mr. Fromm that it would cost $600,000 to reconstruct the road.

federal courts are not free to disregard 28 U.S.C. § 1738, which requires that federal courts give preclusive effect to state-court judgments, simply to guarantee that all takings plaintiffs can have their day in federal court. *San Remo Hotel L.P.*, 125 S.Ct. at 2502. "[I]t is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." *See Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 84 (1984). "This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules." *San Remo Hotel, L.P*, 125 S.Ct. at 2504; *see also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 477 (1982).

An exception to Section 1738 will not be recognized unless Congress has clearly manifested its intent to depart from the full faith and credit statute. Congress has not expressed any intent to exempt from the full faith and credit statute federal takings claims. *Id.* at 2505. As the Supreme Court stated in *Allen v. McCurry*:

> There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

Allen, 449 U.S. at 104.

NP contends that state courts are biased and cannot be trusted to render correct decisions on takings issues. However, state courts are constitutionally obligated to uphold federal law and this Supreme Court has reaffirmed its confidence in the ability of state courts to adjudicate state

and federal claims. *Id.* at 105; *Stone v. Powell*, 428 U.S. 465, 493-494, n. 35 (1976). Moreover, NP ignores the comprehensive evaluation given to this case by the California Appellate and Supreme Courts. The Appellate Court reviewed two recusal requests from NP and answered the second of the two with a detailed order regarding the court's decision to put documents under seal before they were reviewed by the panel. (Pet. App. B at p. B1.) Once the unpublished decision was issued, NP requested publication in a lengthy and detailed letter. The California Supreme Court reviewed both a Petition for Writ of Certiorari and a Petition for Review. In each instance, the state courts reviewed NP's arguments and opposition papers from the City.

In accordance with U.S. Supreme Court law, NP's takings cause of action was thoroughly and properly adjudicated in California's state court. NP has had its day in court and its Petition for Writ of Certiorari does not warrant further review.

D. The Issues Presented by NP Do Not Warrant Review under Rule 10 of the Supreme Court Rules.

NP's Petition does not warrant Supreme Court review. Review on a writ for certiorari is granted only for compelling reasons. Sup. Ct. R. 10. Supreme Court Rule 10 sets out the considerations guiding the Court's decision on whether to grant certiorari. When reviewing state court decisions, the Court considers the following:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10.

Rule 10 considers whether the subject decision is made by the state court of last resort. Thus, the rule suggests that decisions by state courts that are not the court of last resort are less important. There are good reasons for this view. First, a decision by a state intermediate appellate court is less likely to be considered outside of its jurisdiction. Second, the decision of the intermediate appellate court can be corrected later by the state court of last resort. Here, the California Court of Appeal rendered the decision subject to this petition. It is not the court of last resort. The California Supreme Court is, and it denied review of this case.

Even assuming the decision was rendered by a California court of highest resort, neither consideration is met by NP's petition. NP has not asserted that the state court decision conflicts with the decision of another state court of last resort or United States court of appeal. Although NP alleges that the Court of Appeal decision conflicts with relevant decisions of this Court and that of California's Supreme Court, NP does not point this Court to the cases in conflict. This Petition, quite simply, is an effort to obtain Supreme Court review of what NP incorrectly assesses as a misapplication of facts and a settled rule of law. Thus, NP has failed to demonstrate a valid reason justifying this Court's review.

CONCLUSION

This is a simple case of faulty pleading and of a record that fails to sustain any violation of NP's constitutional rights. Neither the decision below nor the record raises the Questions Presented regarding disqualification of an appellate panel and issuance of an unpublished decision. The decision of the California Court of Appeal was correct and in accordance with U.S. Supreme Court law. Thus, NP's takings and nuisance causes of action have been properly adjudicated. For these reasons, the City of Pacifica respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

MICHELLE MARCHETTA KENYON
Counsel of Record
MEGAN H. ACEVEDO
VERONICA RAMIREZ
MCDONOUGH HOLLAND & ALLEN PC
Attorneys at Law
1901 Harrison, 9th Floor
Oakland, California 94612
Tel: 510.273.8780
Fax: 510.839.9104

CECILIA QUICK
City Attorney
City of Pacifica
170 Santa Maria Avenue
Pacifica, California 94044
Tel: 650.738.7308
Fax: 650.359.8947

Attorneys for Respondent
City of Pacifica

California Rule of Court

RULE 978. REQUESTING PUBLICATION OF UNPUBLISHED OPINIONS

(a) Request

(1) Any person may request that an unpublished opinion be ordered published.

(2) The request must be made by a letter to the court that rendered the opinion, concisely stating the person's interest and the reason why the opinion meets a standard for publication.

(3) The request must be delivered to the rendering court within 20 days after the opinion is filed.

(4) The request must be served on all parties.

(b) Action by rendering court

(1) If the rendering court does not or cannot grant the request before the decision is final in that court, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. The rendering court must forward these materials within 15 days after the decision is final in that court.

(2) The rendering court must also send a copy of its recommendation and reasons to all parties and any person who requested publication.

(c) Action by Supreme Court

The Supreme Court may order the opinion published or deny the request. The court must send notice of its action to the rendering court, all parties, and any person who requested publication.

(d) Effect of Supreme Court order to publish

A Supreme Court order to publish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

Cal. Const., art., VI, § 6.

(a) The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, three judges of courts of appeal, 10 judges of superior courts, 2 nonvoting court administrators, and any other nonvoting members as determined by the voting membership of the council, each appointed by the Chief Justice for a three-year term pursuant to procedures established by the council; four members of the State Bar appointed by its governing body for three-year terms; and one member of each house of the Legislature appointed as provided by the house.

(b) Council membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

(c) The council may appoint an Administrative Director of the Courts, who serves at its pleasure and performs functions delegated by the council or the Chief Justice, other than adopting rules of court administration, practice and procedure.

(d) To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent

with statute, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.

(e) The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.

(f) Judges shall report to the Judicial Council as the Chief Justice directs concerning the condition of judicial business in their courts. They shall cooperate with the council and hold court as assigned.

Cal. Const., art., VI, § 14.

The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person.

Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.

Cal. Gov't Code § 68902 Gov't

Such opinions of the Supreme Court, of the courts of appeal, and of the appellate divisions of the superior courts as the Supreme Court may deem expedient shall be published in the official reports. The reports shall be

published under the general supervision of the Supreme Court.

CALIFORNIA CODE OF JUDICIAL ETHICS
CANON 3. A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. All of the judicial duties prescribed by law* shall take precedence over all other activities of every judge. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities

(1) Judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified.

(2) A judge shall be faithful to the law* regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law.*

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers and of all court staff and personnel* under the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice

based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status against parties, witnesses, counsel, or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:

(a) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(b) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(c) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(d) A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(e) A judge may initiate or consider any ex parte communication when expressly authorized by law* to do so.

(8) A judge shall dispose of all judicial matters fairly, promptly, and efficiently.

(9) A judge shall not make any public comment about a pending or impending proceeding in any court, and shall not make any nonpublic comment that might substantially interfere with a fair trial or hearing. The, judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Canon does not prohibit judges from making statements in the course of their official duties or from explaining for public information the procedures of the court, and does not apply to proceedings in which the judge is a litigant in a personal capacity. Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge has presided or to comments or

discussions that might interfere with a fair hearing of the case.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

C. Administrative Responsibilities

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require* staff and court personnel* under the judge's direction and control to observe appropriate standards of conduct and to refrain from manifesting bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to ensure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary court appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall

avoid nepotism and favoritism. A judge shall not approve compensation of appointees above the reasonable value of services rendered.

(5) A judge shall perform administrative duties without bias or prejudice. A judge shall not, in the performance of administrative duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.

D. Disciplinary Responsibilities.

(1) Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge shall take or initiate appropriate corrective action, which may include reporting the violation to the appropriate authority.*

(2) Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge shall take appropriate corrective action.

(3) A judge who is charged by prosecutorial complaint, information, or indictment or convicted of a crime in the United States, other than one that would be considered a misdemeanor not involving moral turpitude or an infraction under California law, but including all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol, shall promptly and in writing report that fact to the Commission on Judicial Performance.

E. Disqualification.

(1) A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law.*

(2) In all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.

(3) Ownership of a corporate bond issued by a party to a proceeding and having a fair market value exceeding one thousand five hundred dollars is disqualifying. Ownership of government bonds issued by a party to a proceeding is disqualifying only if the outcome of the proceeding could substantially affect the value of the judge's bond. Ownership in a mutual or common investment fund that holds bonds is not a disqualifying financial interest.

(4) An appellate justice shall disqualify himself or herself in any proceeding if for any reason:

(a) the justice believes his or her recusal would further the interest of justice; or

(b) the justice substantially doubts his or her capacity to be impartial; or

(c) the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.

(5) Disqualification of an appellate justice is also required in the following instances:

(a) The appellate justice has appeared or otherwise served as a lawyer in the pending matter, or has appeared or served as a lawyer in any other matter

involving any of the same parties if that other matter related to the same contested issues of fact and law as the present matter.

(b) Within the last two years, (i) a party to the proceeding, or an officer, director or trustee thereof, either was a client of the justice when the justice was engaged in the private practice of law or was a client of a lawyer with whom the justice was associated in the private practice of law; or (ii) a lawyer in the proceeding was associated with the justice in the private practice of law.

(c) The appellate justice represented a public officer or entity and personally advised or in any way represented such officer or entity concerning the factual or legal issues in the present proceeding in which the public officer or entity now appears.

(d) The appellate justice, or his or her spouse, or a minor child residing in the household, has a financial interest or is a fiduciary who has a financial interest in, the proceeding, or is a director, advisor, or other active participant in the affairs of a party. A financial interest is defined as ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding one thousand five hundred dollars. Ownership in a mutual or common investment fund that holds securities does not itself constitute a financial interest; holding office in an educational, religious, charitable, fraternal or civic organization does not confer a financial interest in the organization's securities; and a proprietary interest of a policyholder in a mutual insurance company or mutual savings association or similar interest is not a financial interest unless the outcome of the proceeding could substantially affect the value of the interest. A justice shall make reasonable efforts to keep informed about his or

her personal and fiduciary interests and those of his or her spouse and of minor children living in the household.

(e) The justice or his or her spouse, or a person within the third degree of relationship to either of them, or the spouse thereof, is a party or an officer, director or trustee of a party to the proceeding, or a lawyer or spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the justice or of the justice's, spouse, or such a person is associated in the private practice of law with a lawyer in the proceeding.

(f) The justice (i) served as the judge before whom the proceeding was tried or heard in the lower court, (ii) has a personal knowledge of disputed evidentiary facts concerning the proceeding, or (iii) has a personal bias or prejudice concerning a party or a party's lawyer. The justice's spouse or a person within the third degree of relationship to the justice or his or her spouse, or the person's spouse, was a witness in the proceeding.

(g) A temporary or permanent physical impairment renders the justice unable properly to perceive the evidence or conduct the proceedings.

(h) The justice has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding such prospective employment or service, and either of the following applies:

(i) The arrangement is, or the discussion was, with a party to the proceeding;

(ii) The matter before the justice includes issues relating to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment or use of a dispute resolution neutral.

For purposes of this paragraph, "party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.

For purposes of this canon, "dispute resolution neutral" means an arbitrator, a mediator, a temporary judge appointed under section 21 of article VI of the California Constitution, a referee appointed under Code of Civil Procedure section ***638*** or ***639***, a special master, a neutral evaluator, a settlement officer, or a settlement facilitator.

WARSHAW & POPE
ATTORNEYS AT LAW

JAQUELYNN POPE
MARK WARSHAW

934 HERMOSA AVENUE, SUITE 14
HERMOSA BEACH, CA 90254
TEL (310) 379-3410
FAX (310) 376-6817

January 25, 2005

Justice Maria P. Rivera
First Appellate District Court
Division Four
350 McAllister
San Francisco, CA

Re: North Pacifica v. City of Pacifica
Appeal No. A 104951

Dear Justice Rivera:

This letter regards the above-captioned appeal, in which North Pacifica is the respondent, which is currently pending before Division Four. We have recently learned that the above appeal has been assigned to the panel of Justices Sepulveda, Reardon and Rivera.

This is the same panel of Justices that heard the appeal of *North Pacifica v. Coastal Commission*, A101434. The panel denied North Pacifica's appeal in that matter in an unpublished opinion on December 21, 2004. Although the fact that the panel has previously heard a case involving North Pacifica and is now hearing another case involving North Pacifica would not normally bear comment, we are experiencing some discomfiture in this particular circumstance due to the proximity in time between the two appeals.

We are in the process of preparing a Petition for Review to the Supreme Court in A101434. In doing so we are noticing that we have a reluctance to criticize that decision, because we do not wish to offend the panel as it is currently considering the appeal in A104951. Despite our efforts to put this juxtaposition aside, we nonetheless find that the fact that the two cases are before the same panel at virtually the same time is constraining our ability to make arguments critical of this panel's decision in A101434. The reality is that we believe, in a very palpable sense, this situation is chilling North Pacifica's First Amendment right to petition the Supreme Court for Review of the decision in A101434.

It is impossible to prepare papers criticizing the panel's decision in A101434 without at least considering the effect of those arguments on the panel's consideration of the current appeal. We have spoken to several other lawyers whose practice includes appellate work, and most of them have stated that they too have experienced this, and/or would feel the same way. We are enclosing declarations from some of these attorneys. (Ironically, many of them were unwilling to put a declaration to this effect before the Court due to the same fear of offending the Court.)

The lawsuit that underlies the appeal that is currently pending in A 104951 regards a judgment for $3,495,000 plus approximately $1,200,000 in legal fees and costs in respect to a finding of inverse condemnation of seven lots known as the "Fish lots" that are located in the City of Pacifica. This lawsuit does not raise *any* issues in common with the issues that were before the Court in A191434. Rather, A191434 involved a *different* property in the City of Pacifica, known as the Bowl. Although the Bowl

and the Fish are proximate to one another, the lawsuit in A101434 was against the Commission and not the City, and there was no issue of inverse condemnation in A101434. Rather, as this Court knows, in A101434 North Pacifica sought to restrain the Commission from holding a hearing on the issue of its jurisdiction on the grounds that the City's determination that the project was not within the Commission's jurisdiction was entitled to deference and could only be attacked by an administrative writ.

North Pacifica named the City of Pacifica as a real party in interest in A101434 not because North Pacifica was challenging any action of the City, but because the City's determination that North Pacifica's permits were not appealable was being challenged by the Commission, and North Pacifica was defending against that challenge. Thus A101434 was not, in any sense, a lawsuit *against* the City of Pacifica.

Although neither the real property in question nor the issues in the two lawsuits are related, the City of Pacifica has sought to confuse the two cases, in hopes of gaining some advantage, and moved to consolidate the two appeals. This Court rejected the City's application for consolidation. Neither is there any advantage in terms of judicial efficiency to have both cases heard by the same panel. North Pacifica hopes, therefore, that the panel would be willing to transfer the matter to a different division in order to avoid chilling North Pacifica's attempt to obtain review from the Supreme Court.

Although there is no specific precedent for this, the Justices have discretion to recuse themselves in the interest of justice, which would then require that the matter be transferred. The Courts are unified in their

protection of First Amendment rights and the legislature has codified these protections. Both the litigation privilege codified in Civil Code 47a and the SLAPP statutes protect citizens from negative repercussions for exercising their first amendment rights.

The more recent SLAPP statute, found at CCP Section 425.16 specifically defines the phrase "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue'" to include:

> "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law";
>
> "(2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law";

CCP 425.16(d)

Thus here, North Pacifica's actions in seeking review of the Court's decision is clearly an act in furtherance of its rights of petition of free speech.

> Undergirding the immunity conferred by section 47(b) is the broadly applicable policy of assuring litigants "the utmost freedom of access to the courts to secure and defend their rights. . . ." (Albertson v. Raboff, supra, 46 Cal.2d at p. 380.) *We have recently reemphasized the importance of virtually unhindered access to the courts in several opinions.* In Silberg, supra, 50 Cal.3d 205, we said that the "principal purpose of section 47([b]) is to afford litigants . . . *the utmost freedom of*

> *access to the courts without fear of being harassed subsequently by derivative tort actions." (at p.* 213.) And, in Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal.3d 1157 [232 Cal.Rptr. 567, 728 P.2d 1202], we declined to permit the expansion of the abuse of process tort to include the alleged improper filing of a lawsuit; to do so, we reasoned, would remove existing barriers to the maintenance of malicious prosecution actions, requirements that we said "play[] a crucial rule in protecting the right to . . . judicial relief. . . ." (at p. 1170.) In Bear Stearns, supra, 50 Cal.3d 1118, we called the requirement of probable cause in malicious prosecution actions "essential to assure free access to the courts. . . ." (at p. 1131.) (See also Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863, 872 [254 Cal.Rptr. 336, 765 P.2d 498] (Sheldon Appel) [malicious prosecution tort "carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court. . . ."].)

Rubin v. Green, (1993) 4 Cal. 4th 1187, 1194

Obviously here, North Pacifica does not fear "harassment' from the panel, nonetheless it is impossible not to feel that there is a chance that it is risking losing a judgment of approximately $5 million for inverse condemnation and attorneys' fees if it criticizes the prior judgment in A101434 too forcefully. Such a risk cannot be ignored with equanimity, and it affects, and chills North Pacifica's First Amendment rights in the matter of A101434. If North Pacifica exercises its rights and vigorously seeks to overturn A101434 as it wishes to do, North Pacifica fears it

will antagonize the very same justices that will be deciding A 104951.

On the other hand, if North Pacifica stays silent in respect to A101434, even though it strongly disagrees with the Court's ruling in that case, it relinquishes any opportunity it has to overturn that result. This is an untenable situation which has solely occurred because, through happenstance, the very same judicial panel happens to be hearing both cases within the same operative time period.

To the extent that there is any judicial efficiency served by having both appeals heard by the same panel, that efficiency is minor indeed, since, as set forth above, the only similarity between the cases is that North Pacifica is a party to each appeal. On a balancing of benefits and rights, the fact that there is a serious chilling effect on North Pacifica's First Amendment Rights to speak freely and petition the courts must outweigh the slight, if any, benefit conferred by having the same panel hear both cases. If this case A104951 were simply referred to a different panel, NP's First Amendment Rights would not, even arguably be chilled, NP could freely express its objections and appeals concerning A191434, and justice could be served by having another judicial panel consider the pending appeal in A104951.

We would, therefore, with the greatest respect, request that you voluntarily recuse yourself from hearing case A 104951 so that it may be referred to a different panel and the judicial process as envisioned by the First

Amendment of the Constitution may, without fear or chill, take its course.

Respectfully submitted,

/s/ Keith Fromm
KEITH FROMM

/s/ Jaquelynn Pope
JAQUELYNN POPE

Encs.
cc: Joel Jacobs, Natalie West (including enclosures)

S133553

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Jun. 15, 2005)

NORTH PACIFICA LLC, Petitioner

v.

COURT OF APPEAL FIRST APPELLATE DISTRICT DIVISION FOUR, Respondent;

CITY OF PACIFICA, Real Party in Interest.

Petition for writ of review DENIED.

GEORGE
Chief Justice